Supreme Court, U.S.
FILED

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No. -

IN THE

Supreme Court of the United States

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility

Petitioner,

- against -

ROBERT BOHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 12, 2003

QUESTIONS PRESENTED

1. Under Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646 (1988), may a trial court constitutionally preclude an alibi witness on account of the defendant's failure to give alibi notice only if the failure to provide notice was willful?

2. Did "clearly established Federal law" announced by this Court provide that an alibi witness cannot be precluded on account of the failure to give alibi notice except if the failure to provide notice was willful?

3. May a federal habeas court override a state appellate court's conclusion that the defendant was not prejudiced by his attorney's failure to give alibi notice, where the federal court itself acknowledges that the record "gives cause for some hesitation" as to the impact of the precluded testimony?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert Kuhlmann, Superintendent of the Sullivan Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding, affirming the judgment of the district court which granted respondent's petition for a writ of habeas corpus, thereby setting aside his state court conviction for intentional murder.[1]

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit is not reported, but can be found at 66 Fed. Appx. 277, 2003 U.S. App. LEXIS 12272 (2d Cir. 2003). The decision is reprinted in the appendix to this petition at pp. 1a-3a.

The Order of the Court of Appeals for the Second Circuit denying petitioner's request for a panel rehearing and rehearing en banc is not reported. It is reprinted in the appendix at p. 4a.

The Opinion and Order of the United States District Court for the Southern District of New York (Marrero, J.), is reported at 234 F.Supp.2d 231 (S.D.N.Y. 2002). It is reprinted in the appendix at pp. 5a-42a.

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[1] The petitioner is represented in this proceeding by the District Attorney of New York County, New York, by agreement with the Attorney General of the State of New York.

The Magistrate's Report and Recommendation (Francis IV) is reported at 2001 U.S. Dist. LEXIS 21852 (S.D.N.Y. 2001). In addition, it is attached to the District Court's reported decision and can be found at 234 F. Supp.2d at 254-83. It is reprinted in the appendix at pp. 43a-106a.

The Decision of the Appellate Division, First Department unanimously affirming the judgment of conviction is reported at 257 A.D.2d 443, 684 N.Y.S.2d 514 (1st Dept. 1999). It is reprinted in the appendix at pp. 107a-109a. The order of the New York Court of Appeals denying Bohan's application for leave to appeal from that decision is reported at 93 N.Y.2d 871, 689 N.Y.S.2d 433 (1999).

JURISDICTION

This petition for a writ of habeas corpus was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. §2254. On August 2, 2002, the Southern District adopted the Report and Recommendation of the Magistrate Judge and granted the petition.

On June 16, 2003, the Second Circuit affirmed that disposition in a Summary Order. On June 30, 2003, Kuhlmann filed a petition for a panel rehearing or a rehearing en banc. The Second Circuit denied that request by order dated August 18, 2003, and then issued its mandate on September 12, 2003.

This petition for certiorari is filed within ninety days of the date on which petitioner's petition for a panel rehearing or rehearing en banc was denied and is therefore timely. Sup. Ct. R. 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254(d)(1) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

New York Criminal Procedure Law Section 250.20 provides in pertinent part:

> 1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon

whom he intends to rely. For good cause shown, the court may extend the period for service of the notice.

* * *

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

* * *

5. Both the defendant and the people shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their witness lists as provided in this section.

STATEMENT OF THE CASE

The Trial Court Proceedings

The State's evidence at the jury trial established that, on the night of January 12, 1993, respondent Robert Bohan shot 18-year-old Joseph Alvarez, in an execution-style killing. Notably, the murder scene, the sidewalk in front of a building on West 167th Street in Manhattan, was illuminated

by a street light. One eyewitness, the victim's best friend, had seen Bohan before, and identified him as Alvarez's murderer at a lineup the very day after the shooting. A second eyewitness joined him at trial in identifying Bohan as Alvarez's executioner. In addition, the State presented trial testimony that there had been an ongoing dispute between Bohan and the victim, with a number of witnesses testifying that they saw Bohan meet with the victim on various dates, including the very afternoon preceding the murder.

Bohan called a variety of friends, relatives, and long-time acquaintances as defense witnesses. Two defense witnesses claimed that they had been at the crime scene and that Bohan was not the murderer. Their descriptions of the "true" killer, however, were starkly contradictory. Further, one defense witness who reported being at the crime scene, Carmen Rivera, was impeached with evidence that she previously had made oral and written statements that named Bohan as Alvarez's killer.

The defense also was allowed to call two alibi witnesses, even though it never gave any alibi notice, as required by New York statute (N.Y. Criminal Procedure Law ["CPL"] § 250.20). The alibi witnesses -- Bohan's grandmother and a long-time friend -- testified that, at the time of the shooting, Bohan was at his grandmother's apartment.

When the defense sought to call yet a third alibi witness for whom it had not given the requisite statutory notice, the State objected that, unlike the other two, it had never even heard of that witness before. According to the defense proffer, this third witness, Bernardo Rodriguez ("Bernardo"), had been standing on the sidewalk outside Bohan's grandmother's apartment building and had briefly seen Bohan standing in the window of his grandmother's bedroom (Tr. 345-46). Defense counsel had been in possession of a written statement from Bernardo for over a

year, but had never disclosed it to the State. At the same time, Bernardo had not come forward even to defense counsel until more than a year after the murder and Bohan's prompt arrest for that crime.

The trial judge noted that the prosecutor had lost the opportunity to send out his own investigator to try to question Bernardo (Tr. 306). When defense counsel questioned the existence of prejudice, the judge noted that the case was "two and a half years old" (Tr. 310). The prosecutor reiterated that the State did not have "enough time to properly investigate" Bernardo (Tr. 357), and accordingly "would not be able to do a proper cross examination" (Tr. 358). Ruling that she would grant the State's request to preclude Bernardo's testimony, the judge stated, "[t]he point of these notices is that you have a right to put on a defense, but [the] People have a right to prevent perjurious testimony from being presented to the jury and the way they can do that is if they have an opportunity to investigate" (Tr. 359-60). The judge added that she did not know "what is going on here," and had never before seen a trial "where every day a new [witness] comes up out of the air in a case that is two and a half years old" (Tr. 360).

The jury convicted Bohan of intentional murder. On October 11, 1995, Bohan was sentenced to an indeterminate prison term of from 25 years to life.

The Appeal to the Appellate Division

On appeal, the Appellate Division, First Department, of the New York Supreme Court ("First Department") held, inter alia, that the trial court had properly exercised its discretion in precluding the defense from calling Bernardo as an alibi witness where the defense concededly never gave the requisite alibi notice. 257 A.D.2d at 443, 684 N.Y.S.2d at

515. The First Department specifically remarked that, because of the failure to provide alibi notice, "the People were deprived of the opportunity to conduct a proper investigation regarding any of the alibi testimony." Id. In addition, the First Department held that Bohan had received meaningful legal representation, and that his counsel's alleged errors, which included the failure to file the requisite alibi notice, "could not have deprived [Bohan] of a fair trial." Id. at 444, 684 N.Y.S.2d at 515.

The Proceedings in Federal District Court

On June 7, 2000, Bohan filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The petition's seven claims included two that implicated the preclusion of Bernardo's testimony. Bohan claimed that the preclusion of Bernardo's testimony deprived him of his constitutional right to present a defense. In addition, Bohan claimed that the failure to give the requisite alibi notice rendered trial counsel's representation ineffective.

On August 2 and October 1, 2001, Magistrate Judge Francis held a hearing with respect to those claims. At that hearing, the State showed that an important aspect of Bernardo's proffered alibi testimony was inconsistent with the version of the alibi given by Bohan, his mother, and his grandmother before the grand jury. Bernardo's account also was at odds with statements to the police by the friends who allegedly had been with Bohan in his grandmother's apartment at the time of the murder.

Nevertheless, on December 28, 2001, the Magistrate issued a report recommending that the writ be granted on the grounds that Bohan's trial counsel "was ineffective in failing to serve an alibi notice," and that the resulting preclusion of

Bernardo's testimony "denied the petitioner his right to present a defense." 2001 U.S. Dist. LEXIS 21852 at *2. According to the Magistrate, defense counsel's failure to give alibi notice in this case was not willful. Therefore, the Magistrate concluded, the state courts' determination that the preclusion of Bernardo's testimony was appropriate was contrary to this Court's precedent in Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646 (1988). Id. at *73 -*74. The Magistrate relied heavily on the Second Circuit's decision in Noble v. Kelly, 246 F.3d 93 (2d Cir.), cert. denied, 534 U.S. 886 (2001). Id. at *61. With respect to the ineffective assistance of counsel claim, the Magistrate determined that there "was no reasonable justification" for the state appellate court's conclusion that the preclusion of Bernardo's testimony "did not result in the deprivation of a fair trial for the petitioner." Id. at *88.

The District Court judge adopted the Magistrate's Report. The court reached its conclusion "under the reasoning of Noble" v. Kelly, which, it stated, established that "if the Trial Court in the instant case could have used less onerous sanctions to minimize any prejudice to the prosecution, some finding of willfulness was required to justify the exclusion of [Bernardo's] testimony." 234 F. Supp.2d at 248. The court dismissed the State's argument that Noble was not Supreme Court precedent, and thus could not be the source of "clearly established Federal law" for purposes of the habeas statute. Judge Marrero asserted that Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), "does not indicate that a district court is required, or even permitted, to disregard the Circuit's interpretation of 'clearly established Federal law, as determined by the Supreme Court'." 234 F. Supp.2d at 248 n.10.

At the same time that it rejected the State's argument that any error was harmless, the district court stated that it was "mindful that the record here gives cause for some

hesitation." 234 F.Supp.2d at 252. In that regard, the court acknowledged that "there was more than sufficient evidence presented at trial for a rational juror to conclude that Bohan committed the murder in question." Id. The court also acknowledged that "[t]he jury may very well have discredited the testimony of" Bernardo. Id. It stated, however, that it did "not find that this outcome was as inevitable as the State asserts." Id.

The district court's analysis of the prejudice prong of the ineffective assistance of counsel claim referred repeatedly to, and mirrored, its harmless error analysis. The court stated that the state appellate court had "incorrectly concluded" that the preclusion of Bernardo's testimony "could not have deprived [Bohan] of a fair trial." 234 F. Supp.2d at 254. The court opined that, "if the jury had credited [Bernardo's] testimony even partially, there is a reasonable probability that the outcome of the trial would have been different." Id.

The Second Circuit's Decision

In a Summary Order, the Second Circuit (Judges Miner, Jacobs, and Cabranes) "affirm[ed] for substantially the reasons stated by the district court." But the panel, while stating that it was "constrained by" Noble v. Kelly, frankly expressed reservations about the reasoning in that case. In particular, the Summary Order stated, "we have doubts as to whether Taylor v. Illinois prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of willfulness" (internal citation omitted).

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split as to When a Trial Court May Properly Preclude a Defense Witness from Testifying as a Sanction for the Failure to Comply with Applicable Disclosure Rules.

In this case, the state trial court allowed two un-noticed alibi witnesses to testify but precluded the testimony of a third un-noticed alibi witness, whom the State had never even heard of before. The state court did not determine that defense counsel's failure to give alibi notice had been "willful," but found that the State had been deprived of its opportunity to investigate the precluded witness and to protect the trial process from the influence of perjurious testimony. The Second Circuit set aside the state conviction on the theory that willful misconduct by defense counsel is a prerequisite to the preclusion of a last-minute alibi witness. The Ninth Circuit has held similarly. See United States v. Peters, 937 F.2d 1422, 1426 (9th Cir. 1991). That position, however, conflicts with that of the majority of the circuits to have considered the issue.

The First, Fifth, Seventh, Tenth, and District of Columbia Circuits all have rejected the position that this Court's opinion in Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, prevents a court from precluding alibi testimony not disclosed to the prosecution in accordance with applicable notice requirements except upon a finding that defense counsel's failure was the result of willful misconduct. For example, the First Circuit has stated that Taylor "declined to cast a mechanical standard." Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988). In that Court's own words, the First Circuit has "never held that willfulness is the sole predicate of an exclusionary sanction," United States v. Portela, 167

F.3d 687, 705 n.16 (1st Cir. 1999). In the same vein, in United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992), the District of Columbia Circuit stated that "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the Taylor Court's reference to trial court discretion and its extended discussion of the relevant factors."

The Fifth Circuit has stated that Taylor gives "little guidance for determining when the preclusion sanction is permissible." United States v. Alexander, 869 F.2d 808, 812 (5th Cir. 1989), cert. denied, 493 U.S. 1069 (1990). By the same token, the Seventh Circuit has maintained that Taylor "appears to leave the question open" of whether the exclusion of a defense witness is permissible only if the violation of the discovery order was "deliberate." Tyson v. Trigg, 50 F.3d 436, 445 (7th Cir. 1995), cert. denied, 516 U.S. 1041 (1996). That Court further noted that discovery rules "are empty if they cannot be enforced, and weak if they can be enforced only against willful violators." Id. As articulated by the Seventh Circuit, "[g]iven the competing considerations identified" in Taylor, a federal habeas court should not disturb a state court's discovery ruling unless "convinced" that the ruling was "unreasonable." Id.

In Watley v. Williams, 218 F.3d 1156 (10th Cir. 2000), cert. denied, 531 U.S. 1089 (2001), the Tenth Circuit held that the state court reasonably applied Taylor in upholding the preclusion of a defense alibi witness even though the attorney's failure to give the requisite notice was not willful. Just as in this case, the state court had emphasized that the prosecution would suffer prejudice if the un-noticed alibi testimony were admitted. 218 F.3d at 1159. In addition, just as the trial court in this case referred to "perjurious testimony" (Tr. 359), the state appellate court in Watley had commented that, "because of its late discovery, [the precluded witness's] testimony calls into question the

integrity of the judicial process." 218 F.3d at 1159. Tellingly, the Tenth Circuit concluded:

> Reasonable minds may disagree about the appropriateness of excluding an alibi witness whom Petitioner's counsel did not willfully omit, but under [section 2254(d)(1)] we are limited to applying existing Supreme Court precedent. Because the New Mexico Court of Appeals reasonably applied Taylor v. Illinois, we affirm the district court's denial of Petitioner's claim for relief.

Id. at 1159-60.

Accordingly, there is a split in the circuits as to when a trial court may properly preclude a defense witness from testifying as a sanction for the failure to comply with applicable disclosure rules. The need for resolution of this split among the circuits cannot be underestimated.

Alibi-notice statutes or rules are commonplace in the various states. In addition to the New York alibi-notice statute, the other two states in the Second Circuit, Connecticut and Vermont, have rules requiring advance notice of alibi witnesses. See Connecticut Rules for the Superior Court §§ 762-68; V.R.Cr.P. 12.1. The federal judicial system itself is governed by an alibi-notice requirement. Fed. Rules Cr. Proc. Rule 12.1, 18 U.S.C.A. (2003 Pocket Part). Further, as stated in the notes accompanying the initial enactment of the Federal Rule, prohibiting the testimony of a witness as to whom the defense has not given the requisite notice is a "common provision" in state alibi-notice statutes. Notes of Advisory Committee on Rules, Rule 12.1, Fed. Rules Cr. Proc. Rule 12.1, 18 U.S.C.A. at 76 (West Publishing 1986). As the notes explain, "[i]t is generally assumed that the [preclusion]

sanction is essential if the notice-of-alibi rule is to have practical significance." Id. The judicially-imposed restriction of the preclusion sanction to those extraordinary cases in which the record affirmatively shows that defense counsel's failure to give alibi notice was the result of willful misconduct would eviscerate alibi notice requirements. Certainly, with the decision in this case, courts and prosecutors can no longer rely on New York's alibi-notice statute, and also act at their peril in seeking the preclusion sanction authorized under Connecticut's and Vermont's alibi-notice rules.[2] And, as the law now stands, similar alibi notice statutes irrationally will have different consequences depending on the jurisdiction in which a crime is committed.

As this Court has expressly recognized, alibi testimony "can be fabricated" with "ease." Williams v. Florida, 399 U.S. 78, 81, 90 S. Ct. 1893, 1896 (1970). Because of that reality, alibi-notice requirements are "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." Id. at 82, 90 S. Ct. at 1896. The current split in the circuits undermines that salutary goal.

Further, the Second Circuit position does not give effect to the full panoply of interests and concerns identified by this Court in Taylor v. Illinois. Taylor held that the Sixth Amendment right to present a defense does not create an absolute bar to the preclusion of the testimony of a previously undisclosed defense witness. See 484 U.S. at 410-16, 108 S. Ct. at 653-56. This Court stated that "[i]t would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an

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[2] Notably, under Vermont's rules, preclusion of the testimony of an un-noticed alibi witness is mandatory, "except for good cause shown." V.R.Cr.P. 12.1(e).

automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury." Id. at 416, 108 S. Ct. at 656. With respect to the facts of the particular case, this Court held that defense counsel's willful misconduct supported the use of the preclusion sanction. Id. at 417, 108 S. Ct. at 657. This Court did not, however, further hold that the preclusion sanction could never properly be employed where defense counsel did not engage in willful misconduct. To the contrary, this Court stated that "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." Id. at 414, 108 S. Ct. at 656. Rather than iron-clad rules, this Court called for a balancing process:

> The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Id. at 414-15, 108 S. Ct. at 656.

By according determinative weight to whether defense counsel acted in bad faith, the Second Circuit gives improperly short shrift to the other factors that this Court expressly identified in Taylor v. Illinois as bearing on the propriety of the use of the preclusion sanction. Indeed, even while the Second Circuit gave lip service to the prejudice to the State from an eleventh-hour defense alibi witness, the breezy reference to "minimiz[ing]" such prejudice did not give proper weight to that factor. In addition, the Second Circuit position essentially ignores what Taylor emphasized was "the broader public interest in a full and truthful

disclosure of critical facts." 484 U.S. at 412, 108 S. Ct. at 654.

It is of no small moment that the panel that affirmed the grant of the writ of habeas corpus in this case itself expressed doubt that the Second Circuit position that un-noticed alibi testimony cannot be precluded except when there is a finding of willful misconduct constitutes a proper interpretation of Taylor v Illinois. Unfortunately, the panel felt constrained by Second Circuit precedent not to re-examine that position. Only this Court therefore can rectify the law in the Second and Ninth Circuits, make the law across jurisdictions uniform by resolving the split in the circuits, and establish that Taylor v. Illinois should not be interpreted in a way that eviscerates alibi-notice statutes.

II. Under Williams v. Taylor, the court below wrongly applied Second Circuit law when there was no clearly established law from this Court.

The split in the circuits as to how to understand Taylor v. Illinois has a special significance in this habeas corpus case that went unnoticed in the courts below. Under this Court's seminal decision in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, the mere existence of a dramatic conflict in the circuits means that the state court rulings here did not run afoul of "clearly" established Federal law, as required before a federal habeas court may properly set aside a state criminal conviction. As stated in Williams v. Taylor, "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." 529 U.S. at 404, 120 S. Ct. at 1518. To that end, current habeas law constrains the power of a federal habeas court to set aside state criminal convictions, see id. at 412, 120 S. Ct. at 1523, to instances in which a state court decision runs afoul of "clearly established Federal law, as determined by" this

Court. 28 U.S.C. §2254(d)(1). When different circuits interpret the same Supreme Court opinion differently, the ineluctable conclusion is that there is no "clearly established" Supreme Court precedent with which a state court decision could be in conflict.

Again, it is telling that the Second Circuit panel itself stated that, while it felt constrained to reach the result it did under the Second Circuit's prior opinion in Noble v. Kelly, it doubted whether the position that a trial court could not preclude an un-noticed alibi witness absent a finding of willful misconduct by defense counsel was a correct interpretation of this Court's opinion in Taylor v. Illinois. Under Williams v. Taylor, none of the circuit court opinions discussing the interpretation of Taylor v. Illinois itself constitutes clearly established federal law for habeas purposes. The Second Circuit and the district court both were wrong to feel constrained by Noble v. Kelly, when Taylor v. Illinois was the true touchstone.

In fact, for reasons discussed in detail in the briefs below, but too lengthy for inclusion in a petition for certiorari, the preclusion of Bernardo's un-noticed alibi testimony when the defense was allowed to call two other alibi witnesses, at the very least, constituted a reasonable balancing of the various factors mentioned in Taylor v. Illinois. The state court decisions in this case therefore constituted a reasonable application of federal law. Thus, the Second Circuit decision in this case is at odds not only with the law in other circuits but also with the intent of Congress, as reflected in the current habeas statute, and as repeatedly recognized in this Court's decisions, to give deference to state court decisions.

III. The federal courts did not give proper deference to the state court's determination that the preclusion of Bernardo's testimony did not deprive Bohan of a fair trial.

The analysis in this case of the prejudice prong of the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), also conflicts with this Court's habeas jurisprudence. Williams v. Taylor established that "an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." 529 U.S. at 412, 120 S. Ct. at 1522 (emphasis in the original). What that meant, said this Court, was that

> [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable.

Id. Echoing those principles, this Court stated in Woodford v. Visciotti, 537 U.S. 19, 27, 123 S. Ct. 357, 361 (2002):

> [U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.

(internal citation omitted).

The district court in this case determined that the state appellate court's conclusion that the preclusion of Bernardo's testimony "could not have deprived [Bohan] of a fair trial," 257 A.D.2d at 444, 684 N.Y.S.2d at 515, was "incorrect[]," 234 F.Supp.2d at 254. The Second Circuit left that determination undisturbed. But, in fact, the federal district court here did precisely what this Court's decisions teach that a federal habeas court should not do -- it substituted its own independent judgment with respect to the Strickland prejudice prong for the judgment of the state appellate court.

Had the district court focused on the correct issue of whether the state appellate court's decision was "objectively unreasonable," its own statements show that the writ should not have been granted. After all, how could it have been objectively unreasonable for the state court to conclude that the preclusion of Bernardo's testimony did not prejudice Bohan when the district court itself stated that the record "gives cause for some hesitation," that there was "more than sufficient evidence presented at trial for a rational juror to conclude that Bohan committed the murder in question," and that "[t]he jury may very well have discredited the testimony of" Bernardo? 234 F.Supp.2d at 252. The strength of the trial evidence of Bohan's guilt by itself was an appropriate, objective basis for the state court's conclusion. Another objective basis was provided by the weakness of the alibi testimony that the defense did present at trial. And, as the First Circuit has stated, "[i]f it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002).

This Court should use this case to reiterate that a federal habeas court must conduct the Strickland analysis with the appropriate deference to the relevant state court. That is necessary both to give effect to the congressional intent

reflected in current habeas law and to prevent claims of ineffective assistance of counsel from becoming a backhand vehicle for eviscerating alibi-notice requirements.

CONCLUSION

For the aforementioned reasons, petitioner, Robert Kuhlmann, respectfully requests this Court to grant this petition for a writ of certiorari to review the judgment of the Second Circuit setting aside Bohan's state murder conviction.

Respectfully submitted,

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December 12, 2003

Supreme Court, U.S.
FILED

(2)

03 877 NOV 14 2003

No. -

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility

Petitioner,

- against -

ROBERT BOHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
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November 14, 2003

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

ROBERT BOHAN, Petitioner-Appellee-Cross-Appellant, -against- ROBERT KUHLMANN, Superintendent, Sullivan Correctional Facility, Respondent-Appellant-Cross-Appellee	02-2580(L), 03-2050(XAP)

June 16, 2003, Decided

PRESENT: HON. ROGER J. MINER, HON. DENNIS JACOBS, HON. JOSE A. CABRANES, Circuit Judges.

APPEARING FOR PETITIONER-APPELLEE-CROSS-APPELLANT: JOEL A. BRENNER, East Northport, NY.

APPEARING FOR RESPONDENT-APPELLANT-CROSS-APPELLEE: SYLVIA WERTHEIMER, Assistant District Attorney, New York County, NY (Robert M. Morganthau, District Attorney, Mark Dwyer, Assistant District Attorney, on the briefs).

Appeal from the United States District Court for the Southern District of New York (Marrero, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the case is **AFFIRMED**.

The government appeals from a final judgment in the United States District Court for the Southern District of New York (Marrero, J.) granting Robert Bohan's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We affirm for substantially

the reasons stated by the district court. See Bohan v. Kuhlmann, 234 F. Supp. 2d 231 (S.D.N.Y. 2002).

The district court opinion relies upon Noble v. Kelley, 246 F.3d 93 (2d Cir.), cert. denied, 534 U.S. 886, 151 L. Ed. 2d 139, 122 S. Ct. 197 (2001). Although this panel is likewise constrained by that precedent, we have doubts as to whether Taylor v. Illinois, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988), prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of wilfulness.

We also granted a Certificate of Appealability on the issue of whether comments by the prosecution during summation deprived Bohan of a fair trial. Because Bohan is entitled to habeas relief on other grounds, we decline to decide this issue and dismiss this separately docketed cross-appeal (docket no. 03-2050).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of August two thousand three.

ROBERT BOHAN,

Petitioner-Appellee-cross-Appellant,

v.

ROBERT KUHLMANN,

Respondent-Appellant-cross-Appellee.

AUG 18 2003

Docket No. 02-2580(L), 03-2050(xap)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant-cross-appellee Robert Kuhlmann,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

Laura Bass Penn
Motions Staff Attorney

p o ccc
inbancdn_frm

AUG 14 2003

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BOHAN,

Petitioner-Appellee-Cross-Appellant,

-against-

ROBERT KUHLMANN, Superintendent, Sullivan Correctional Facility,

Respondent-Appellant-Cross-Appellee.

JOEL A. BRENNER, ESQ.
Attorney for Petitioner
East Northport, NY

ROBERT M. MORGENTHAU
District Attorney New York County
New York, NY
Attorney for Respondent
By: Sylvia Wertheimer.
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VICTOR MARRERO, D.J.

Petitioner Robert Bohan ("Bohan") was convicted on July 13, 1995, in New York State Supreme Court, New York County (the "Trial Court") for murder in the second degree. On June 7, 2000, Bohan filed a petition for a writ of habeas corpus in this Court, pursuant to 28 U.S.C. § 2254 ("§ 2254"), asserting, inter alia, that: (1) there was insufficient evidence to sustain his conviction; (2) the Trial Court's preclusion of testimony from an alibi witness violated his rights under the Compulsory Process Clause of the Sixth Amendment; (3) he was deprived of his right to be present at all material stages of the trial; (4) he was denied a fair trial due to prosecutorial misconduct; (5) he was denied effective assistance of counsel at trial; and (6) the Trial Court violated his rights under the Fifth and Fourteenth Amendments by imposing the maximum sentence for his conviction. The Court referred the case to Magistrate Judge James C. Francis IV and on December 28, 2001, he issued a Report and Recommendation (the "Report"), recommending that the writ be granted because Bohan's trial counsel was ineffective and because the preclusion of Bohan's alibi witness violated his Sixth Amendment right to present a defense. The Report is attached and incorporated hereto. For the reasons discussed below, the Court fully adopts the Report and Recommendation of Magistrate Judge Francis and grants Bohan's writ of habeas corpus.

1. BACKGROUND

A. The Facts

On January 12, 1993, at approximately 10:25 p.m., Joseph Alvarez ("Alvarez") was selling crack cocaine under a streetlight in front of 448 West 167th Street in Manhattan when a man wearing a hood shot him twice in the chest and back, killing him. Bohan was

indicted for murder in connection with this incident. At trial, the prosecution argued that Bohan committed the murder on account of a dispute that Bohan and his brother, Nicholas, had with Alvarez and an associate of Alvarez named Junior. The dispute had arisen six months earlier during an incident in which Nicholas Bohan punched Junior and Junior pulled out a gun and fired in response. (Tr. at 66.)[1] A prosecution witness named Jamal Williams ("Williams"), who had been a long-time friend of Bohan's, testified that he had witnessed the dispute. After the incident, Williams attended a number of meetings in a nearby McDonald's restaurant with Bohan and Alvarez. According to Williams, in one of the meetings, Bohan threatened to "get" both Williams and Alvarez if they did not help him find Junior. (Tr. at 71.)[2]

Williams and another prosecution witness, Michael Jenkins, further testified that they saw Bohan murder Alvarez on January 12, 1993. Williams said that he was selling crack cocaine with Alvarez and another associate named Manny Martinez ("Martinez") under a street light when Bohan approached, drew a gun, and shot Alvarez. (Tr. at 74.) Williams stated that, before the shooting, he looked straight at Bohan's face from a distance of approximately three feet. (Tr. at 83.) However, Williams also testified that he was with Martinez in the hallway of a nearby building just before Alvarez was shot. (Tr. at 84, 123.) The day after the shooting, Williams identified Bohan in a police line-up as the shooter (Tr. at 77), but during the trial Williams pointed to Bohan's brother when asked to identify the assailant. (Tr. at 66.) Williams also stated that he was scared to testify because he believed that Bohan had "people on the outside." (Tr. at 113.)

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[1] "Tr." refers to the transcript from Bohan's trial.

[2] Williams gave contradictory information about who was present during the meetings in McDonald's. Furthermore, other witnesses testified that they attended meetings with Bohan and Alvarez in the same McDonald's, but none of them testified that Williams was present. Id.

Jenkins testified that on the night of the murder, Bohan approached Alvarez, coming within fifteen to twenty feet of Jenkins, and fired three shots. (Tr. at 187.) Unlike Williams, Jenkins identified Bohan in the courtroom as the person who shot Alvarez. Shawn Criss ("Criss"), the Government's third eyewitness from the murder scene, testified that he was six to seven feet away from Alvarez when the shooting occurred. According to Jenkins, it was dark and he "didn't really look" at the shooter. (Tr. at 139.) The only description he could provide was that the assailant was light-skinned, "Spanish looking" and wearing a sweatshirt with his hood up. (Tr. at 141-42.)

In defense, Bohan called Carmen Rodriguez ("C. Rodriguez"), who was incarcerated at Rikers Island ("Rikers"), to testify. Because C. Rodriguez had tested positive for tuberculosis, the Trial Court took her testimony via video from a room at Rikers and presented a recording of the testimony to the jury. (Tr. 217, 314.) Bohan was present during her testimony but seated in an adjacent room that contained a glass partition through which he could see the interview.

Prior to the trial, Bohan's attorney, Earl Rawlins ("Rawlins") had asked the Government to interview C. Rodriguez, with the hope that she would disclose information that would persuade the Government to dismiss the charges against Bohan. Assistant District Attorney Stuart Silberg ("Silberg"), did meet with C. Rodriguez at that time and she told him that Bohan did not shoot Alvarez. (Tr. at 25.) However, several days later C. Rodriguez met again with Silberg and Police Detective Michael Vasquez ("Detective Vasquez") and told them that she had lied to Silberg because Bohan's father had promised to take care of her if she testified that Bohan was not the shooter. (Tr. at 432-33, 435-36.) C. Rodriguez then also stated that on the night of the murder, she was

talking to Alvarez when Bohan approached and shot him. During her meeting with Silberg and Detective Vasquez, C. Rodriguez also signed a statement indicating that Bohan was the shooter. (Tr. at 433-34.) However, in her trial testimony, C. Rodriguez stated that she neither signed the statement nor told anyone that Bohan had shot Alvarez. (Tr. at 324-25.)

After the Government presented its case-in-chief, Rawlins informed the Trial Court and the prosecution that he intended to call three alibi witnesses: Bohan's grandmother, Julia Feci ("Feci"), and two of Bohan's friends, Roberto Cruz ("Cruz") and Bernardo Rodriguez ("B. Rodriguez"). Although Silberg had requested, long before the trial commenced, that Rawlins provide notice of any alibi witnesses he intended to call, Rawlins had failed to do so, as required by section 250.20 of the New York Criminal Procedure Law ("CPL § 250.20").[3] Silberg consented to both Feci and Cruz

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[3] The relevant portion of CPL § 250.20 states:

> At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel . . ., a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people . . ., a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for service of the notice. . ..
>
> If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating

testifying at trial because Feci had appeared before the grand jury and had mentioned Cruz's name, thus alerting the prosecution that these two people might be called by the defense. In contrast, Silberg claimed that he had never known about B. Rodriguez and objected to his testifying at trial. (Tr. at 222-23, 302-03.)

Feci testified that, on the night of the murder, Bohan and several of his friends, including Cruz, were in her apartment at 640 West 171st Street. She was upset with them because they had damaged her furniture. At one point, she testified that Cruz said goodnight at 10:15 p.m. (Tr. at 232). According to Feci, soon thereafter, Bohan entered her room, apologized for breaking a bed, and watched a television program with her until 11 p.m. (Tr. at 232-33, 246.) Later in her testimony, she said that Cruz left at 10:30 (Tr. at 233, 243) and that Bohan came to her room at 10:45 p.m. and stayed until 11 p.m. (Tr. at 244-47.)

Cruz testified that, on the night of the murder, he was in the apartment with Bohan, Bohan's brother Nicholas, and two other friends named Angel Zapata ("Zapata") and Jason Pena ("Pena"). According to Cruz, soon after 10 p.m., Feci threw him and the other visitors out of her apartment because they had broken a bed. He testified that he said goodnight to Feci at 10:05 p.m. and left ten minutes later. He arrived at his apartment, which was across the street, at 10:30. He later testified that he was unsure of when he

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to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

Both the defendant and the people shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their witness lists as provided in this section.

left Feci's apartment but he was sure that he reached his apartment by 10:30. (Tr. at 265, 269-70.)

After Cruz testified, Rawlins indicated that he intended to call B. Rodriguez. The Trial Court held a hearing outside the presence of the jury, pursuant to People v. Dawson, 50 N.Y.2d 311, 321, 428 N.Y.S.2d 914, 406 N.E.2d 771 (1980), to allow Silberg to inquire into the reason for B. Rodriguez's failure to inform law enforcement authorities that Bohan had not committed the murder. B. Rodriguez testified that on the night of the murder, around 10:05 or 10:10 p.m., he was returning from work when he saw Cruz, Zapata, Pena and Albert Montilla ("Montilla") standing on the street in front of 640 West 171st Street. (Tr. at 283.) When he approached them, they explained that Feci had thrown them out of her apartment. At that point, which was around 10:10 or 10:15 p.m., B. Rodriguez looked up at the window of Feci's apartment and saw Bohan standing and talking to Feci. (Tr. at 285). According to B. Rodriguez, Bohan seemed upset. (Id.) He remained at that location on the street until 11:10 or 11:15 p.m. (Tr. at 284.) B. Rodriguez said he learned two days later that Bohan had been charged with killing someone. (Tr. at 287.) He testified that he did not go to the police to report what he had witnessed because he thought that Bohan had been wrongly accused and that Bohan "was going to come home in a couple of days." (Tr. at 288.)

Approximately one month after the murder, B. Rodriguez learned that the murder victim was from West 167th Street. (Tr. at 291.) He could not recall if anyone told him the victim's name. B. Rodriguez knew that Bohan had been arrested for the murder and had not come home yet. (Id.) His family told him to talk to Bohan's attorney. One of his parents told him to talk to the police and the other told him not to. (Tr. at 293.) He testified that he felt he was doing enough by talking to Bohan's attorney. (Tr. at 294.)

Soon thereafter, B. Rodriguez spoke with Rawlins and at his request B. Rodriguez wrote out a statement about what he had seen on the night of the murder. On March 10, 1994, B. Rodriguez faxed the statement to Rawlins. Although Rawlins was required to provide the written statement to Silberg before trial, Rawlins mistakenly asserted that Bohan's previous attorney had received the statement from B. Rodriguez and that he was unaware that Silberg had not received it.[4](Tr. at 297.) Silberg asserted that the Trial Court should preclude B. Rodriguez from testifying at trial not only because "defense counsel did not comply with the alibi statute," but also because of "the prejudice . . . to the people because we had not had enough time to investigate Mr. Rodriguez." (Tr. at 357.) Silberg further asserted that Bohan would not be prejudiced by the exclusion of B. Rodriguez because the Government had consented to the testimony of two other alibi witnesses, namely Feci and Cruz. (Tr. at 358.) The Trial Court precluded B. Rodriguez's testimony, stating:

> I'm convinced . . . [that] this is a violation of the alibi statute and something improper has occurred here. The point of these notices is that you have a right to put on a defense, but [the] People have a right to prevent perjurious testimony from being presented to the jury and the way they can do that is if they have an opportunity to investigate prior - we

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[4] There is nothing in the record to suggest that this mistaken assertion was intentional. Bohan did, in fact, have an attorney before Rawlins named Barry Weinstein. (Tr. 298.) Rather, Rawlins mistaken assertion that he did not personally receive the statement is consistent with his explanation that he did not file an alibi notice for B. Rodriguez because he had forgotten about the statement until the morning of the Dawson hearing. As discussed below, his mistakes appear to have resulted from carelessness and incompetence rather than any attempt to gain a tactical advantage during the trial.

> are at the end of the trial. . . . No good cause has been given by you for failure to serve an alibi notice, let alone come up with an entirely new witness who your alibi witness in the grand jury did not mention.

(Tr. at 359-60.) Later, Rawlins claimed that B. Rodriguez had in fact come to his office in 1994, but since he was unfamiliar with B. Rodriguez's name at the time, he decided not to do anything with the statement until other alibi witnesses, with whom he was familiar, came forward. Rawlins claimed that he had forgotten about the statement until the morning of the Dawson hearing, when he happened to be going through Bohan's file because another alibi witness had called him. (Tr. at 345.)

At the conclusion of the trial on July 13, 1995, the jury found Bohan guilty of murder in the second degree. The Trial Court later sentenced him to the maximum term of imprisonment, which was twenty five years to life. On March 19, 1998, Joel Brenner, Bohan's current attorney, appealed Bohan's conviction to the New York Appellate Division, First Department (the "Appellate Division"), asserting, inter alia, that Bohan received ineffective assistance of counsel and that the Trial Court's preclusion of B. Rodriguez violated Bohan's right under both the New York Constitution and the Sixth Amendment of the United States Constitution to present a defense.

In a Memorandum Decision, dated January 12, 1999, the Appellate Division rejected all of Bohan's claims. Regarding the alleged ineffective assistance of counsel, the Appellate Division stated that "defendant received meaningful representation. Counsel's alleged errors could not have deprived defendant of a fair trial." People v. Bohan, 257 A.D.2d 443, 684 N.Y.S.2d 514, 515 (App. Div. 1st Dep't 1999) (citation omitted). Regarding the

Trial Court's preclusion of B. Rodriguez's testimony, the Appellate Division stated that "the trial court properly exercised its discretion in precluding defendant from calling a third alibi witness, since the defense concededly failed to give proper alibi notice pursuant to [CPL § 250.20] and since the People were deprived of the opportunity to conduct a proper investigation regarding any of the alibi testimony." Id. Bohan appealed the Appellate Division's decision, and on March 15, 1999, the New York Court of Appeals denied Bohan's application for leave to appeal. See People v. Bohan, 93 N.Y.2d 871, 711 N.E.2d 647, 689 N.Y.S.2d 433 (N.Y. 1999).

Bohan filed the instant petition on June 7, 2000. Magistrate Judge Francis held hearings on August 2 and October 1, 2001 to "determine whether Bernardo Rodriguez's testimony would have been cumulative had he been permitted to testify at trial and to explore the circumstances of Mr. Rawlins'[s] failure to serve any alibi notice." (Report at 20.) At the August 2, 2001 hearing, Bohan testified that he told Rawlins in November or early December of 1993 that he had an alibi, more than one year before his trial. (Transcript of August 2, 2002 Evidentiary Hearing before Magistrate Judge James C. Francis IV ("First Fed."), at 12.) Bohan told Rawlins that his grandmother, Cruz, Pena, Zapata, Montilla and B. Rodriguez were all alibi witnesses. (First Fed. at 13.) According to Bohan, after his arrest, B. Rodriguez told Feci that he was "downstairs" on the night of the murder. (First Fed. at 13.) When Bohan learned of this from Feci, he told Rawlins about B. Rodriguez. Rawlins asked Bohan for B. Rodriguez's number.

Before the trial, Bohan asked Rawlins if he was going to call B. Rodriguez. Rawlins replied that "he had a witness" from the scene of the murder who would testify that the shooter was not Bohan.

(First Fed. at 20.)[5] As discussed above, Rawlins failed to serve the prosecution with an alibi notice as required under New York law. After Bohan was convicted, Rawlins told Bohan that he should appeal on the grounds that the preclusion of B. Rodriguez as an alibi witness was improper. (First Fed. at 14.) According to Bohan, Rawlins told him that "you got a big issue on appeal . . . because I fucked up." (First Fed. at 20.)

On cross examination, Silberg presented Bohan with the transcript from his grand jury testimony. Before the grand jury, Bohan had testified that several friends of his, including Cruz and Montilla, had stayed in his grandmother's apartment with him until 11 p.m. (First Fed. at 29.) This grand jury testimony was inconsistent with B. Rodriguez's March 1994 statement and his testimony in state court and at the federal hearing that when he came to the area in front of 640 West 171st Street, he saw a number of friends on the street, including Cruz and Montilla. At the evidentiary hearing before the Magistrate Judge, Bohan claimed that this inconsistency was due to a mistake in the grand jury minutes, as to the time when he testified that Cruz and Montilla were in the apartment. (First Fed. at 30.) Bohan asserted that, before the grand jury, he actually testified that his friends left the apartment around 10 p.m. and the grand jury minutes incorrectly stated 11 p.m. (First Fed. at 28-29.)

After Bohan testified, his counsel called Silberg to testify about information he received from Rawlins before trial. Silberg testified that he knew, from the grand jury minutes, of the potential that Bohan would put on an alibi defense. (First Fed. at 40.) When asked how he became aware of B. Rodriguez, Silberg testified that, on the first day of the trial, as he and Rawlins "were waiting for the

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[5] It appears from the transcript that the witness Rawlins was referring to was C. Rodriguez. (First Fed. at 21.)

jury panel to assemble," Rawlins indicated that: "he had some witnesses to call . . ., he believed some of those witnesses were alibi witnesses," and that although Silberg was "aware of some of those witnesses because they were mentioned in the grand jury, . . . there might be other witnesses as well." (First Fed. at 40-41.) Silberg further testified, "I'm not sure if [Rawlins] actually told me [B.] Rodriguez's name at that time." (First Fed. at 41.) Later in the hearing, Silberg testified that when Rawlins told him about the potential alibi witnesses off the record, he was "troubled by learning about Mr. Rodriguez." (First Fed. at 48.)[6]

Silberg testified that he told Rawlins that he was not happy that he had not received an alibi notice and that they would have to discuss the matter on the record with the judge. (Id.) He also stated that he was less concerned about the alibi witnesses whom he knew about and was very concerned about the witnesses he had never heard about. (Id.) Silberg already had information on some of the potential alibi witnesses, such as Pena, Zapata, Montilla and Cruz. After the murder, they had been interviewed by Detective Vasquez and had signed statements. The statement of each of these witnesses indicated that, except for Cruz, they were with Bohan in his grandmother's apartment at the time of the murder. (First Fed. at 43.)

According to Silberg, had he known about B. Rodriguez earlier, he would have "checked into it or, if nothing else, at least think about it and factor it into my case . . . ." (Id. at 42.) When Silberg learned about B. Rodriguez, he made inquiries and

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[6] In the Report, the Magistrate Judge correctly notes that it appears from the trial transcript that Silberg actually first heard of B. Rodriguez's name at the Dawson hearing on July 12, 1995, seven days after the jury selection. (See Report at 25 (citing Tr. at 303, 355).

discovered that he had no criminal record.[7] (Id. at 45.) Silberg also spoke with a detective in the homicide investigations unit who was able provide Silberg with some information about B. Rodriguez and a relative of B. Rodriguez's who was suspected of having connections with a narcotics dealer. (Id. at 46.)

On October 1, 2002, the Magistrate Judge conducted a second hearing to allow Rawlins to testify. Rawlins indicated that he never provided Silberg with notice for any of the alibi witnesses that he called at trial, although they discussed the issue. (Transcript of October, 2002 Evidentiary Hearing before Magistrate Judge James C. Francis IV ("Second Fed."), at 3-4.) When asked why he did not comply with the notice requirement of the alibi statute, Rawlins stated: "I did not recall having specific information prior to the time that I had reviewed the file, just before the trial, and found a specific worthwhile letter in there that would be useful to have testimony, alibi testimony." (Second Fed. at 4.) According to Rawlins, once he became aware of B. Rodriguez's letter, he told Silberg that he had alibi witnesses to call. (Id.) On cross examination, Silberg asked Rawlins whether he was wary about providing information about B. Rodriguez because he was afraid that it "wouldn't work out well if [Silberg] had an opportunity to speak with Mr. Rodriguez." (Second Fed. at 7.) Rawlins replied, "no it's the contrary - I would be more than happy to give you that letter so you could check it out." (Id.) Silberg also asked Rawlins if he told Bohan that he "fucked up with the alibi in the case." (Second Fed. at 10.) Although Rawlins could not specifically recall whether he told Bohan that he had made a mistake, he testified that he told Bohan that his alibi defense presented an appealable issue.

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[7] Silberg could not recall whether the other potential alibi witnesses, such as Cruz, Zapata, Montilla and Pena, had criminal records. (First Fed. at 47.)

(Id.) During the hearing, Rawlins conceded that his handling of Bohan's alibi defense "certainly was a mistake." (Id.)

On December 28, 2001, the Magistrate Judge issued a seventy-four page Report and Recommendation, which carefully analyzed each of the grounds that Bohan raised in his petition. The Report concludes that: (1) there was sufficient evidence to support Bohan's conviction; (2) his absence from the examination room during the questioning of C. Rodriguez did not affect the fairness of his trial and was, at most, harmless error; (3) the Trial Court's rulings on the admissibility of statements by witnesses that they were afraid did not violate Bohan's constitutional rights; (4) the prosecutor did not engage in misconduct during his summation; and (5) the trial judge did not violate Bohan's Fifth Amendment rights when she sentenced him. However, on Bohan's two remaining claims, the Magistrate Judge concluded that: (1) the Trial Court's preclusion of alibi testimony violated the Compulsory Process clause of the Sixth Amendment of the United States Constitution; and (2) Rawlins's failure to comply with the alibi notice statute deprived Bohan of effective assistance of counsel. As a result, the Magistrate Judge recommended that the writ be granted. On January 4, 2002, Bohan filed objections to the Report, asserting, among other things, that the Report: (1) fails to consider "internal inconsistencies" in certain testimony before concluding that there was sufficient evidence to sustain Bohan's conviction; and (2) incorrectly concludes that Bohan's exclusion from the room where C. Rodriguez testified was subject to a harmless error analysis. On January 30, 2002, respondent Robert Kuhlmann, Superintendent of the Sullivan Correctional Facility (the "State") filed objections to the Report, asserting, inter alia, that: (1) the Report does not accurately convey the import of the trial evidence; and (2) Bohan is not entitled to habeas corpus relief based on the preclusion of B. Rodriguez's testimony or on the alleged ineffective assistance of counsel.

II. DISCUSSION

A. STANDARD OF REVIEW

1. The Report and Recommendation

The Federal Magistrate Act provides that a district judge may "designate a magistrate to conduct hearings, including evidentiary hearings" in order to "submit to a judge of the court proposed findings of fact and recommendations for the disposition . . . of applications for post-trial relief made by individuals convicted of criminal offenses . . . ." 28 U.S.C. § 636(b)(1)(B) (2000). In reviewing the Report, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(2000); see Fed. R. Civ. P. 72(b). Any party may object to the Magistrate Judge's findings and recommendations. See id. If an objection is timely filed, as is the case here, the Court is bound to make a "de novo determination of those portions of the report . . . or recommendations to which objection is made." Id. See United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). Having conducted a careful de novo review of the Magistrate Judge's well-reasoned Report, and of the objections by Bohan and the State, the Court fully adopts the findings and recommendation of the Report. The majority of issues raised by Bohan are meritless and the Court declines to add to the findings of the Report.[8] However, because Bohan's two

[8] More specifically, having reviewed the record and Bohan's objections, the Court finds that: (1) there was sufficient evidence for a rational juror to conclude, beyond a reasonable doubt, that Bohan committed the charged murder; (2) Bohan's exclusion from the room where C. Rodriguez testified did not violate his constitutional rights; (3) the prosecutor did not engage in

meritorious claims present significant issues, the Court addresses them below.

2. Exhaustion

A federal court may entertain a petition for a writ of habeas corpus only where the petitioner has first "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (2000). See Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971); Caballero v. Keane, 42 F.3d 738, 740 (2d Cir. 1994); Daye v. Attorney General of New York, 696 F.2d 186, 190 (2d Cir. 1982). This requirement mandates a habeas petitioner to have "fairly presented" in state court the claims that are raised in the habeas petition. Picard, 404 U.S. at 275. See Duncan v. Henry, 513 U.S. 364, 365-66, 130 L. Ed. 2d 865, 115 S. Ct. 887 (1995); Strogov v. Attorney General of New York, 191 F.3d 188, 191 (2d Cir. 1999), cert. denied, 530 U.S. 1264, 147 L. Ed. 2d 987, 120 S. Ct. 2723 (2000); Gonzalez v. Sullivan, 934 F.2d 419, 422 (2d Cir. 1991).

3. AEDPA

The Court notes that, because Bohan's petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), this action is governed by the habeas statute as amended. See Williams v. Taylor, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000); 28 U.S.C. § 2254. Pursuant to the various sub-sections of § 2254, this Court's review is guided by certain restrictions on the nature and extent of review that a federal court can conduct in considering a habeas petition.

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misconduct; and (4) the Trial Court's imposition of the maximum sentence did not violate Bohan's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

In a habeas corpus proceeding, "a determination of a factual issue made by a state court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1) (2000). Petitioner, however, may rebut the presumption by clear and convincing evidence. See id. Consequently, this Court presumes that the factual findings of the New York courts are correct and will not set aside those findings unless "the material facts were not adequately developed at the State court hearing" or the court's factual determinations are not fairly supported by the record. Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999).

4. AEDPA's "Contrary to" and "Unreasonable Application" Prongs

As amended, Section 2254(d) of the AEDPA provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1) (2000). The United States Supreme Court recently decided the proper interpretation of § 2254(d)(1) and the manner in which a federal court is to consider the legal conclusions of a state court. See Williams, 529 U.S. at 362. The Court held that § 2254(d)(1) defines two categories of cases, each with independent meaning, in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in

state court. See id. at 404-06. Parsing the explicit text of the statute, the Court stated that a federal court may grant a writ of habeas corpus if the state court decision is either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Id.

A state court's decision may be held contrary to clearly established Supreme Court precedent in either of two occasions: (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." Id. at 405-06. Regarding the "unreasonable application" prong of § 2254(d)(1), the Court held that a state court decision involves an unreasonable application of its precedent "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 407. The Court further commented that:

> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411. The relevant inquiry under this clause, therefore, is "whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.

The Court further addressed the meaning of the phrase "clearly established Federal law." See id. at 412. The phrase restricts the source of clearly established law exclusively to the Supreme Court's jurisprudence-- "the holdings, as opposed to dicta, of [the] Court's decisions as of the time of the relevant state-court decision." See id. Accordingly, this Court, sitting as a federal habeas court in reviewing Bohan's petition, is guided by and restricted to applicable United States Supreme Court precedent. Because this Court concludes that the New York state courts adjudicated Bohan's claims on the merits, the Court finds that Williams does apply to this case.

B. PRECLUSION OF BOHAN'S ALIBI WITNESS

1. The Sixth Amendment Right to Present a Defense

Under the Sixth Amendment to the United States Constitution, every criminal defendant has "the right to . . . have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. Pursuant to the Sixth Amendment, criminal defendants have a right to "the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt." Taylor v. Illinois, 484 U.S. 400, 408, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 56, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)). Every person accused of a crime has a fundamental right to present witnesses in his own defense. See id. (citing Chambers v. Mississippi, 410 U.S. 284,

302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)). Such a right is an "essential attribute of the adversary system itself." Id. The right to compel a witness's presence in the courtroom could not protect the "integrity of the adversary process if it did not embrace the right to have the witness's testimony heard by the trier of fact." Id. at 409. It is well-settled that an accused person's right to present witnesses in his defense is fundamental:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. (quoting Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)).

However, this right is not unlimited. See id. at 410; see also Noble v. Kelly, 89 F. Supp. 2d 443, 454 (2000), aff'd, 246 F.3d 93 (2d Cir.), cert denied, 534 U.S. 886, 151 L. Ed. 2d 139, 122 S. Ct. 197 (2001). For example, a court may limit the presentation of evidence if it is concerned about "harassment, prejudice, confusion of the issues, the witness's safety or interrogation that is repetitive or only marginally relevant." Noble, 89 F. Supp. 2d at 454 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986)). As the Supreme Court stated in Taylor:

> The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. . . . The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.

484 U.S. at 410-11.

In a criminal trial, the state clearly has a very strong interest in the orderly presentation of evidence that will assist a trier of fact to ascertain the truth. Such an interest includes "protecting itself against an eleventh-hour defense." Id. at 411. To achieve this end, New York, like many other states, has enacted an alibi-notice statute, requiring defendants to provide the prosecution with notice if they intend to pursue an alibi defense and call witnesses to this end. See CPL § 250.20. The Supreme Court has specifically approved of such a statute, as applied in a particular case in Florida:

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it

> is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.

Williams v. Florida, 399 U.S. 78, 81-81, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970).

In the instant case, the Appellate Division rejected Bohan's claim that the Trial Court's preclusion of B. Rodriguez's testimony violated his right to compulsory process under the Sixth Amendment. In his Report, the Magistrate Judge concluded that the Appellate Division's denial of this claim was "contrary to . . . clearly established federal law," as the term is used in § 2254(d)(1). (See Report at 62.) The Report states: "By not considering 'whether defense counsel had wilfully or in bad faith failed to comply with the alibi notice requirement,' the Appellate Division did not follow Supreme Court precedent as established in Taylor, 484 U.S. at 415." (Id.) (quoting Noble, 89 F. Supp. 2d at 461.) The Magistrate Judge further found that even if the "unreasonable application" clause of § 2254 were controlling, "it would not alter the results." (Report at 62-63.) Furthermore, the Magistrate Judge concluded that the Trial Court's error of precluding the testimony of B. Rodriguez was not harmless.

The State makes numerous objections to the Report's findings that the Trial Court's preclusion of testimony from B. Rodriguez was constitutional error that prejudiced Bohan's defense. It asserts that: 1) the Report did not correctly apply the deferential standard of review mandated by AEDPA;[9] 2) the Report incorrectly

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[9] The Court agrees with the State's assertion that Bohan's claims were "adjudicated on the merits," such that the AEDPA standard of review applies. See Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001). However, the Court notes that the Magistrate Judge's Report essentially agrees with this assertion

concluded that the state court's rejection of Bohan's Sixth Amendment claim was "contrary to" or "an unreasonable application" of the Supreme Court's opinion in Taylor; 3) even if the state court did violate Bohan's constitutional rights, the Report incorrectly found that the error was prejudicial. For the reasons discussed below, the Court disagrees with each of the State's objections.

In its objections to the Report, the State asserts that "to the extent that it purported to analyze petitioner's claims under the AEDPA standard of review, the Report did not correctly apply the relevant components of that standard." (See Respondent's Objections to the Magistrate Judge's Report and Recommendation, dated January 25, 2002 (the "State's Obj."), at 14.) In support of this argument, the State contends that the "contrary to" clause of § 2254 does not apply "since the state court decision did 'not explicitly refer to either the federal claim or the relevant federal caselaw,' the federal courts are not in a position to know what the Appellate Division did or did not consider in rejecting that claim." (State's Obj. at 14 (quoting Sellan, 261 F.3d at 311).) This argument is misplaced. Sellan does not support the State's proposition that the decision of a state court is immune to being "contrary to" established federal law simply because the state court failed to articulate its analysis. In fact, the Second Circuit held the opposite to be true. See Sellan, 261 F.3d at 312 ("We recognize that a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to' tests. However, the absence of an explanation does not absolve us from performing the same task.").

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and applied this standard of review. (See Report at 60 ("[Bohan's claim] appears to have been adjudicated on the merits").)

The State also asserts that, even if the "contrary to" language in § 2254 applies to the instant case, the Magistrate Judge "did not correctly interpret and apply the relevant components of that standard." (State's Obj. at 14.) The Court disagrees. In a decision that pre-dated Taylor, the Second Circuit held that alibi testimony is so critical that it cannot be excluded notwithstanding procedural defaults, even when, as in the instant case, counsel "offered the court no reasonable explanation" for failure to comply with the state notice requirements for alibi testimony. Escalera v. Coombe, 826 F.2d 185, 188 (2d Cir. 1987) ("Escalera I"). The Supreme Court vacated Escalera I and remanded the case for reconsideration, in light of its analysis in Taylor. See Coombe v. Escalera, 484 U.S. 1054, 98 L. Ed. 2d 971, 108 S. Ct. 1004 (1988). The Second Circuit, in turn, remanded the case to the district court for further inquiry consistent with Taylor:

> [The district court judge] did note in his opinion below that the attorney's "apparent bad faith--or, at least, the absence of a good excuse--was evident" in the failure properly to give notice of his intent to call [an alibi witness]. But this alone is not enough. The absence of a good excuse is not necessarily commensurate with "willful" conduct and it is not readily clear whether Escalera's attorney was, in fact, motivated by a desire to obtain a tactical advantage.

Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988) (per curiam) ("Escalera II") (quoting Escalera v. Coombe, 652 F. Supp. 1316, 1324 (E.D.N.Y. 1987)) (emphasis added).

In Noble, the district court addressed a similar issue: Whether a state court's preclusion of alibi witness testimony violated a defendant's compulsory process rights under the Sixth

Amendment. See Noble, 89 F. Supp. 2d at 454-59. There, during the petitioner's trial in state court, his counsel had attempted to call an alibi witness, whose name he had failed to disclose to the prosecution in a timely manner, as required by CPL § 250.20. See id. at 448. The trial court granted the prosecution's application to exclude the alibi testimony, due to defense counsel's failure to comply with CPL § 250.20. See id. In doing so, the trial court considered and rejected defense counsel's assertion that preclusion was unnecessary because a short adjournment would provide the prosecution with sufficient time to prepare for the unnoticed alibi witness. See id. at 449.

On habeas review, the federal district court held that the trial court's failure to inquire into the willfulness of defense counsel's conduct violated the defendant's Compulsory Process rights under the Sixth Amendment. See id. at 457. ("[W]here, as is the case here, the record discloses no indication that the trial court ever considered whether defense counsel's failure to comply with the notice requirement was designed to frustrate the truth-seeking function of the trial, we conclude that the court's exclusion of the alibi evidence violated the defendant's rights under the Compulsory Process Clause."). The district court concluded that this finding was "reinforced by the minimal degree of prejudice that an alternative sanction would have caused the prosecution." Id. More specifically, the court found that: (1) during the state trial in question, "unlike the typical alibi defense," the prosecution had a "wealth of evidence about the place where the defendant claimed to have been and about other witnesses who might contradict that testimony;" (2) since the alibi witness in question was "proffered after the close of the prosecution's case," no prosecution witnesses would have been inconvenienced by a brief delay; and (3) had the trial court allowed the alibi witness to testify, but granted the prosecution additional time to prepare a cross-examination or to adduce rebuttal testimony, "the record from which the jury would

be asked to render a verdict would have been more complete and accurate, not less." Id.

The Second Circuit affirmed, stating that "under the circumstances of this case, the state trial court could have used less onerous sanctions (such as an adjournment) to minimize any prejudice to the prosecution, and that a finding of willfulness was therefore required to justify the exclusion of [the precluded witness's] testimony." Noble, 246 F.3d at 100 (citing Noble, 89 F. Supp. 2d at 457) (emphasis added). However, the Second Circuit explicitly declined to address the level of willfulness that would provide a trial court with sufficient grounds to properly exclude alibi testimony:

> We [] need not decide whether, and to what extent, a finding of willfulness is required in every case. For purposes of the present case, we need only conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony must be supported by a finding of some degree of willfulness in defense counsel's violation of the applicable discovery rules.

Noble, 246 F.3d at 100 n.3. Accordingly, under the reasoning of Noble, if the Trial Court in the instant case could have used less onerous sanctions to minimize any prejudice to the prosecution, some finding of willfulness was required to justify the exclusion of the testimony of B. Rodriguez.[10]

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[10] Citing the Supreme Court's ruling in Williams, the State asserts that the Second Circuit's decision in Noble is irrelevant to the instant petition because "only Supreme Court precedent is relevant under the AEDPA, and Noble was not a decision of the Supreme Court." (State's Obj. at 15.) Williams, however, does not indicate that a district court is required, or even permitted, to disregard the Circuit's interpretation of "clearly established Federal law, as

Applying this standard, the Magistrate Judge found that: (1) "the trial court could have minimized any prejudice to the prosecution with a short adjournment;" (2) "the prosecution in this case had a wealth of evidence about the place where the defendant claimed to have been and about other witnesses who might contradict Mr. Rodriguez's testimony;" and (3) "Mr. Rodriguez 'was proffered as a witness after the close of the prosecution's case and so no prosecution witnesses would have been inconvenienced by a short delay.'" (Report at 58 (quoting Noble, F. Supp. 2d at 457).) The Magistrate Judge also found that there was no evidence that Rawlins's failure to "give notice of Bernardo Rodriguez was willful or motivated by a desire to gain a tactical advantage." (Report at 53.) The Court agrees. Crediting Bohan's statement about Rawlins's explanation for failing to provide notice concerning B. Rodriguez's alibi testimony, and Rawlins's own apparently equivocal reasons, the record convincingly supports a finding that Rawlins simply mishandled the matter as opposed to a finding that he sought to achieve some tactical advantage.

The State contends that the Report's conclusion that the prejudice from the testimony of an unnoticed alibi witness could have been minimized by a short adjournment was "erroneous." (State's Obj. at 24-25.) However, in Noble the Second Circuit did

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determined by the Supreme Court . . . ." 28 U.S.C. § 2254. Such a reading of Williams is inconsistent with the history and structure of our federal courts. Furthermore, subsequent to the Second Circuit's decision in Noble, at least one appellate state court in New York has acknowledged that "under the federal standard, if the explanation proffered by [a] defendant for the untimely application to file alibi notice reveals that the omission was willful and motivated by a desire to obtain a tactical advantage, the witness's testimony may be properly excluded." People v. Walker, 743 N.Y.S.2d 403, 404 (App. Div. 1st Dep't May 21, 2002). The logical implication of Walker is that if the defendant's proffered explanation does not reveal that the omission was willful, the witness's testimony may not be excluded.

not state that, under the facts of that case, a short adjournment would have eliminated all prejudice to the prosecution. It merely stated that the prejudice to the prosecution could have been minimized with relative ease. The same is true in the instant case. Although it is not entirely clear that Silberg had a "wealth of evidence" about the relevance of people loitering on the street below Feci's apartment, the Court agrees with the Report that the Trial Court could have minimized any prejudice to the prosecution with a short adjournment and that the prosecution's witnesses would not have been inconvenienced by a short delay. If the accounts of all of Bohan's alibi witnesses, including B. Rodriguez, were clearly a sham, as the State contends (see State's Obj. at 24), then impeachment of these witnesses should not have been as difficult as the State maintains. Cruz had already testified and Montilla was present during parts of the trial. (See State's Obj. at 24 n.15.) The State could have used a short adjournment to prepare for further questioning of these two individuals.[11]

The State also maintains that the Report is incorrect in its conclusion that neither the Trial Court nor the Appellate Division made any findings about the willfulness of Rawlins's conduct. (State's Obj. at 21 n.13.) The Court disagrees. When the Trial Court precluded B. Rodriguez's testimony it stated: "I'm precluding this witness. It's a clear violation of the Statute. And in my discretion, you have not given me good cause why this man's name [was] not served as an alibi. . . ." (Tr. at 308.) Rawlins later tried to

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[11] The Court also questions the level of difficulty the State would have faced in calling Zapata and Pena, who were both incarcerated at the time of the trial. There is no indication that Bohan or anyone associated with him attempted to meet with these potential witnesses before or during trial and again, if B. Rodriguez's account of events was fabricated, as the State maintains, then testimony by these two individuals potentially could have revealed that falseness to the jury.

argue that the State was improperly reserving its objections for defense witnesses who had no criminal record. In response, the Court stated:

> You are mixing apples and oranges. I'm more convinced this is a violation of the alibi statute and something improper has occurred here. The point of these notices is that you have a right to put on a defense, but [the] People have a right to prevent perjurious testimony from being presented to the jury and the way [that] they can do that is if they have an opportunity to investigate prior [to trial].

(Tr. at 359-360.) Although the Trial Court stated that it was convinced that "something improper has occurred," it made no further inquiries into the reasons for Rawlins's failure to provide "good cause" for not serving an alibi notice. See Escalera II, 852 F.2d at 48 ("The absence of a good excuse is not necessarily commensurate with willful conduct . . . .") (quotation omitted). Furthermore, by emphasizing that the "People have a right to prevent perjurious testimony from being presented to the jury," the Trial Court suggested that what it considered "improper" may have been B. Rodriguez's potential fabrication of testimony. There is simply nothing in the record to indicate that the Trial Court made any clear findings, considered or intended as such, with respect to Rawlins's willfulness, or that Rawlins's failure to comply with the notice requirements of the alibi statute was due to anything more than defense counsel's ill-preparation and blunder.

2. Harmless Error

When a defendant's constitutional rights have been violated due to trial error, habeas relief is warranted only if the error "had substantial and injurious effect or influence in determining the

jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)).[12] n12 As noted in the Report, the Second Circuit has recently articulated the proper standard for a harmless error analysis of witness preclusion:

> Whether the exclusion of [witnesses'] testimony violated [defendant's] right to present a defense depends upon whether "the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." In a close case, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." On habeas review, trial errors are subject to lenient harmless error review. The creation of otherwise non-existent reasonable doubt satisfies the "substantial and injurious" standard [of Brecht].

Washington v. Schriver, 255 F.3d 45, 56-57 (2d Cir. 2001) (quoting Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000). In his Report, the Magistrate Judge concluded that "Mr. Rodriguez's testimony places the petitioner at home during the time period unaccounted for by other witnesses, thus providing critical support to Mr. Bohan's alibi. . .." (Report at 67.)

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[12] The Court agrees with the Report that, because the Appellate Division found that the instant case presented no constitutional error, the issue of harmlessness was not adjudicated on the merits. (See Report at 64 n.29.) As a result, the Court need not address the question of whether the Brecht standard applies to post-AEDPA claims that are adjudicated on the merits. See Noble, 246 F.3d at 101 n.5.

In its objections to this aspect of the Report, the State contends that even if the preclusion of B. Rodriguez's testimony violated Bohan's constitutional rights, contrary to the findings of the Report, any error was harmless. (See State's Obj. at 31.) In support of this position, the State essentially reiterates arguments that were thoroughly considered and rejected by the Magistrate Judge. It asserts that: (1) the Report understates the strength of testimony identifying Bohan as the murderer; (2) the Report ignores the obvious biases of the alibi witnesses; (3) B. Rodriguez's testimony would have added nothing to the credibility of other alibi witnesses; and (4) B. Rodriguez's failure to approach law enforcement authorities earlier would have drastically undermined the credibility of his testimony. (See State's Obj. at 32-33.) In spite of these objections, the Court agrees with the Report's conclusion that the preclusion of B. Rodriguez as an alibi witness was not harmless error.

As the Report notes, "in his summation, the prosecutor argued that the testimony from the two alibi witnesses was not inconsistent with the prosecution's theory of the case, because neither could account for the petitioner's whereabouts from a little after 10:00 to 10:45 p.m.; thus giving him enough time to commit the murder." (Report at 66.) During summation, Silberg told the jury:

> The most important thing about Ms. Feci in the context of the defendant's case . . . is [that] she was too late. . . . She says [she saw the defendant at] 10:45, the murder occurred four or five blocks away at 10:25, so there is enough time to commit the murder and get back. . . . You heard from Roberto Cruz, too early. He said he's playing video games and leaves defendant around 10:00 . . . .

> When you put the two witnesses together [Feci and Cruz] . . . what you get is too early and too late. Defense calls the grandmother and Roberto Cruz, they didn't call [Zapata], [Pena] or [Montilla], didn't call any of the other people . . . . Why aren't they calling the people with the defendant at the time of the crime?

(Tr. at 517-18.) It is somewhat disingenuous for the State to now claim that, in making this argument, the prosecutor was only trying to "refrain from a direct, frontal assault on the credibility of petitioner's 79-year old, hard-of-hearing grandmother, and on that of petitioner's long-time friend." (State's Obj. at 35.) Had the prosecutor felt that a "direct, frontal assault" of the alibi testimony would have been more effective in persuading the jury of the State's case, it is highly unlikely that he would have refrained from utilizing such a tactic. Instead, a review of the record reveals that the gap in time, highlighted by the prosecutor on summation "bore on an issue that [was] plainly critical to the jury's decision; . . . was material to the establishment of the critical fact [and was not] instead . . . cumulative; and [concerned issues] emphasized in arguments to the jury." (Report at 68 (quoting Wray v. Johnson, 202 F.3d 515, 526 (2000)).) See also Noble, 89 F. Supp. 2d at 458-59. B. Rodriguez would have testified that he saw Bohan and Feci in the window of the apartment at approximately 10:10 or 10:15 and that he stayed on the street until 11:10 or 11:15. (Tr. at 284-85.) If the jury had credited his testimony, it could have potentially bolstered the testimony of Bohan's other alibi witnesses who maintained that he was in Feci's apartment at the time when the murder occurred.

The State's argument that "Bernardo's time estimate is more realistically viewed as a deliberate contrivance to help his long-time friend . . ." (State's Obj. at 36), is of no consequence. As noted

in the Report, the degree to which B. Rodriguez's credibility was affected by his interests and by inconsistent statements by other witnesses is a matter for the jury, not the Court. As the Supreme Court has stated:

> [T]he conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . . We believe that [this] reasoning [is] required by the Sixth Amendment.

Washington v. Texas, 388 U.S. at 21 (quoting Rosen v. United States, 245 U.S. 467, 471, 62 L. Ed. 406, 38 S. Ct. 148 (1918); United States v. Doyle, 130 F.3d 523, 543 (2d Cir. 1997). If the jury, or any single member of it, were to credit B. Rodriguez's testimony even partially, so that it created a reasonable doubt about Bohan's guilt, he would have been acquitted or entitled to a new trial. The Court thus finds that the record in this case presents a "grave doubt" as to whether the Trial Court's preclusion of B. Rodriguez's testimony was harmless. O'Neal v. McAninch, 513 U.S. 432, 436-37, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995). Accordingly, the Court concludes that Bohan's writ for habeas corpus must be granted because: (1) the Trial Court violated Bohan's Sixth Amendment right to compulsory process when it precluded the testimony of B. Rodriguez, absent a finding of willful misconduct; and (2) the Trial Court's error was not harmless.

In reaching this conclusion, the Court is mindful that the record here gives cause for some hesitation. As the Report correctly notes, there was more than sufficient evidence presented at trial for a

rational juror to conclude that Bohan committed the murder in question. (See Report at 29-30.) The jury may very well have discredited the testimony of B. Rodriguez, but, given the critical importance of the timing of events in this case, the Court does not find that this outcome was as inevitable as the State asserts. Ironically, although the prosecution adamantly maintained at trial that it would be prejudiced by the presentation of B. Rodriguez's testimony, it now asserts that the same testimony would have been cumulative and inherently incredible. When, as in the instant case, rulings by a state court manifesting constitutional error create grave doubts about their effect on a petitioner's guilty verdict, a federal court has an obligation to grant a writ of habeas corpus. O'Neal, 513 U.S. 432, 436-37, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995) ("In cases of grave doubt as to harmlessness the petitioner must win"). Although the State has valid interests in the orderly presentation of evidence and preserving its ability to fully prepare for the testimony of alibi witnesses, such interests cannot override a defendant's fundamental right to present witnesses in his defense, absent a finding a willfulness or bad-faith by the defendant or his counsel. See Noble, 246 F.3d at 100; cf. In re Winship, 397 U.S. 358, 372, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Op. 2d 323 (1970) (Harlan, J., concurring) ("In a criminal case, . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . The requirement of proof beyond a reasonable doubt in a criminal case is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

C. INEFFECTIVE ASSISTANCE OF COUNSEL

In his petition, Bohan asserts that Rawlins made numerous mistakes before and during trial that amounted to ineffective

assistance of counsel. With regard to nearly all of these alleged mistakes, the Report concluded that Bohan "has not established that 'but for' these failings, the outcome of the trial would have been different." (Report at 49-50 (citing Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).) With respect to Rawlins's failure to serve the prosecution with alibi notices, however, the Report concluded that his conduct fell "outside of the wide range of professionally competent assistance," and that there is "more than a 'reasonable probability' that the trial result would have been different 'but for' [his] errors." (Report at 71 (quoting Strickland, 466 U.S. at 694.) The Report also found that Bohan had exhausted his state remedies for his ineffective assistance claims, since he raised them in his direct appeal to the Appellate Division. (See Report at 46-47.) The Court agrees.[13]

Under Strickland, a petitioner who seeks a reversal of his conviction for ineffective assistance of counsel must establish that: (1) counsel's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) the deficient performance prejudiced the defense, meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. With respect to the first element, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. With respect to the second element, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

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[13] After conducting a de novo review of Report's findings, the Court agrees that nearly all of Bohan's grounds for ineffective assistance of counsel are insufficient to warrant the granting of a writ of habeas corpus. Because Rawlins's failure to serve alibi notices presents a more difficult question, the Court addresses this aspect of Bohan's ineffective assistance claim below.

A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

In the instant case, the State contends that: (1) the Report erroneously concludes that Bohan exhausted his ineffective assistance claims in state court; and (2) Rawlins's deficient performance did not prejudice the defense because B. Rodriguez's alibi testimony was "unreliable and even had it been admitted, would not have affected the outcome of the trial." (State's Obj. at 39.)[14]

Under New York Criminal Procedure Law, § 440.10 ("CPL § 440.10"), a convicted defendant may move a sentencing court to vacate his judgment on the ground that "material evidence adduced by the people at a trial resulting in judgement was procured in violation of the defendant's rights under the constitution of [New York] or of the United States . . . ." CPL § 440.10(1)(d). The State maintains that Bohan's "failure to pursue his ineffective assistance claim in the state courts by way of a motion under CPL § 440.10 contravenes the firmly entrenched New York rule that only by such a motion can a proper record be developed with respect to factual issues that cannot be resolved based on the appellate record alone." (State's Obj. at 39.)

The Court finds that, contrary to the State's objection, Bohan exhausted his ineffective assistance of counsel claim. It is well-settled that "once the state courts have ruled upon a claim, it is not necessary for a petitioner 'to ask the state for collateral relief, based

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[14] The state presents no objections with respect to the Report's findings that Rawlins's failure to serve an alibi notice "was caused by his sheer ineptitude" and that his conduct "clearly falls outside of the wide range of professionally competent assistance." (Report at 71 (citing Strickland, 466 U.S. at 690.) Accordingly, the Court adopts this aspect of the Report and need not conduct a de novo review of the first prong of the Strickland analysis.

upon the same evidence and issues already decided by direct review.'" Castille v. Peoples, 489 U.S. 346, 349, 103 L. Ed. 2d 380, 109 S. Ct. 1056 (1989) (quoting Brown v. Allen, 344 U.S. 443, 447-449, 97 L. Ed. 469, 73 S. Ct. 397 (1953)). Once the Appellate Division rejected Bohan's ineffective assistance claim and the Court of Appeals denied leave to appeal, he had exhausted this claim in state court. See Castille, 489 U.S. at 351; Meggett v. Miller, 1994 U.S. Dist. LEXIS 20346, 1994 WL 808048, *5 (S.D.N.Y. July 23, 1994) ("Even if the petitioner failed to comply with state procedural requirements, he will be deemed to have exhausted his state-court remedies if the highest state court nonetheless addresses the claim.").

The Court also agrees with the Report's conclusion that there is more than a "reasonable probability" that the trial result would have been different "but for" Rawlins's deficient performance as Bohan's trial counsel. As discussed above in Part B.2, if Rawlins had properly filed a notice for B. Rodriguez's alibi testimony and the jury had heard his testimony, there is at least a reasonable probability that the outcome of the trial might have been different. See Strickland, 466 U.S. at 694. In reviewing this claim on direct appeal, the Appellate Division came to the opposite conclusion: "On the existing record, which [Bohan] has not sought to amplify by a motion pursuant to CPL 440.10, we conclude that defendant received meaningful representation. Counsel's alleged errors could not have deprived defendant of a fair trial." Bohan, 684 N.Y.S.2d at 515 (citing People v. Benevento, 91 N.Y.2d 708, 697 N.E.2d 584, 587-88, 674 N.Y.S.2d 629 (N.Y. 1998)). In Benevento, although the New York Court of Appeals acknowledged that Strickland established the federal standard for an ineffective assistance of counsel claim, it applied its own standard that pre-dated Strickland. See Benevento, 697 N.E.2d at 589. Under the New York Constitution, a claim of ineffectiveness is "ultimately concerned with fairness of the process as a whole rather than its

particular impact on the outcome of a case. . . . Thus, whether defendant would have been acquitted on the charges but for counsel's errors is relevant, but not dispositive under the State guarantee of effective assistance of counsel." Id. at 588. As noted in the Magistrate Judge's Report, this standard is not "diametrically different" from the standard under Strickland. (See Report at 72-73 (citing Williams, 529 U.S. at 405-06).) In fact, the New York standard is more expansive than Strickland and would provide relief to some defendants who would not be entitled to relief under federal law.

Accordingly, the Court agrees with the Reports' conclusion that the Appellate Division's denial of Bohan's ineffective assistance claim was "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court . . . ." 28 U.S.C. § 2254(d)(1). The Appellate Division incorrectly concluded that Rawlins's failure to serve the prosecution with an alibi notice for B. Rodriguez's testimony "could not have deprived [Bohan] of a fair trial." Bohan, 684 N.Y.S.2d at 515. As discussed above, if the jury had credited B. Rodriguez's testimony even partially, there is a reasonable probability that the outcome of the trial would have been different.

III. CONCLUSION AND ORDER

For the reasons set forth above, it is hereby

ORDERED that Bohan's petition for a writ of habeas corpus is GRANTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BOHAN, Petitioner, -against- ROBERT KUHLMANN, Superintendent, Sullivan Correctional Facility, Respondent	00 Civ. 4225 (VM) (JCF) REPORT AND RECOMMENDATION

TO THE HONORABLE VICTOR MARRERO, U.S.D.J.:

Robert Bohan brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for murder in the second degree following a jury trial before the Honorable Bonnie Wittner in New York State Supreme Court, New York County. He argues that: (1) there was insufficient evidence to support the conviction; (2) the preclusion of testimony from an alibi witness violated his right to present a defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment; (3) he was deprived of his right to be present during all material stages of the trial; (4) he was denied a fair trial due to prosecutorial misconduct; (5) he was denied effective assistance of counsel; and (6) the trial court imposed the maximum sentence in violation of his Fifth and Fourteenth Amendment rights. Because Mr. Bohan's counsel was ineffective in failing to serve an alibi

notice and because the preclusion of that witness denied the petitioner his right to present a defense, I recommend that the writ be granted.

Background

At about 10:25 p.m. on January 12, 1993, Joseph Alvarez was selling crack cocaine on the street in front of 448 West 167th Street in Manhattan when a man wearing a hood approached and shot him twice in the chest and back, killing him. (Tr. 44-45, 73, 138-39, 141, 210, 226).[1] There had been an ongoing dispute among Mr. Alvarez; the petitioner; the petitioner's brother, Nicholas Bohan; and another drug dealer known as Junior who was an associate of Mr. Alvarez. At some point prior to the murder, the petitioner's brother had punched Junior, who responded by firing a gun at him. (Tr. 36, 66).[2] Afterwards, Robert and Nicholas Bohan met with Mr. Alvarez several times to obtain his help in finding Junior, but Mr. Alvarez apparently demurred. (Tr. 67, 71-72). The prosecution argued that this motivated the petitioner to murder him. (Tr. 36-38, 515).

A. Prosecution Witnesses[3]

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[1] "Tr." refers to the trial transcript.

[2] Although the prosecutor said in his opening statement that it was the petitioner who had been shot at by Junior, it is undisputed that it was the petitioner's brother. (Respondent's Appellate Brief, included as Exh. B in Appendix in Support of Answer Opposing Petition for a Writ of Habeas Corpus ("Resp. App."), at 3).

[3] Only the testimony of those prosecution witnesses relevant to the habeas petition is described here.

1. Jamal Williams

The prosecution presented the testimony of three eyewitnesses at trial, the first of whom was Jamal Williams, a long-time friend of Mr. Alvarez. (Tr. 62-63). He saw Junior shoot at the petitioner's brother, and sometime after the incident Mr. Williams and Mr. Alvarez met with Robert and Nicholas Bohan and a friend of the Bohans in a McDonald's restaurant.[4] According to Mr. Williams, Robert Bohan warned that if Mr. Alvarez and Mr. Williams did not help him find Junior, he would "get" both of them. (Tr. 66-68, 71). Two other prosecution witnesses also testified that they had gone with Mr. Alvarez when he met with the petitioner at McDonald's, but they contended Mr. Williams was not present. (Tr. 152-53, 167-68, 170-72). Mr. Williams further testified that he had seen Mr. Bohan about three times a week for six weeks prior to the murder, though in his grand jury testimony he claimed to have only seen him a total of three or four times. (Tr. 92-94, 105).

On the night of the murder, Mr. Williams was selling crack cocaine with Mr. Alvarez and a man named Manny Martinez. (Tr. 63). He denied using the drug that evening but admitted to having smoked marijuana. (Tr. 64, 81). Mr. Williams said that he was on the street standing three feet away from Mr. Alvarez when a man wearing a "cap" approached Mr. Alvarez, uttered a few words, and then shot him. (Tr. 73-75, 89). However, Mr. Williams told the grand jury he had been in the hallway of a building rolling a

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[4] Mr. Williams gave contradictory information about who was present at McDonald's. On direct and cross-examination, he first stated that he met with the petitioner's brother (Mr. Williams referred to him as Mike although his true name is Nicholas), not the petitioner, but then identified the petitioner as having been present. (Tr. 66-68, 70, 92-94).

marijuana cigarette with Mr. Martinez when the shots were fired, although he claimed that he could see what was going on in the street. (Tr. 83-84, 123). Mr. Williams also testified at trial that the assailant wore black pants and a black and white leather jacket, but had earlier given a statement to the police indicating the shooter was wearing blue jeans. (Tr. 79, 86). Additionally, during the trial he described the gun used as silver with a black handle (Tr. 98), but before the grand jury, he denied having seen the gun. (Tr. 100).

The day after the murder, Mr. Williams identified the petitioner as the shooter in a line-up. At trial, he also named the shooter as Robert Bohan but identified the petitioner's brother, who was in the courtroom, as the assailant. (Tr. 66-68, 457-58). Subsequently, he denied that the perpetrator was in the courtroom. (Tr. 68-69). Mr. Williams then admitted that the person who shot Mr. Alvarez was the petitioner's brother, whom Mr. Williams incorrectly called Mike Bohan. (Tr. 93). Finally, Mr. Williams claimed Robert Bohan committed the murder. (Tr. 118).

During Mr. Williams' redirect examination by Assistant District Attorney Stuart Silberg, the following exchange took place between Mr. Williams, the judge, Mr. Silberg, and the petitioner's trial counsel, Earl Rawlins:

MR. SILBERG: Mr. Williams, you scared?

MR. WILLIAMS: Yes, I am.

MR. SILBERG: What are you scared of?

MR. WILLIAMS: My life.

MR. SILBERG: Why is that?

MR. WILLIAMS: Because he got people on the outside.

MR. RAWLINS: Objection. Move to strike.

THE COURT: Overruled. Come up, please.

[Attorneys approach sidebar for a discussion out of the hearing of the witness and the jury.]

THE COURT: First of all, I want to put on the record what occurred, which I think I'm correct. I'll stand corrected if I'm not. Right before the break, Mr. Rawlins was cross-examining and the witness started crying and couldn't answer any further questions. In addition, my observations have been that throughout this trial there have been at least two brothers, three sisters and maybe the father here staring at this witness and they're constantly going in and out of the Courtroom. It was also reported to me that they're reporting to someone outside the Courtroom who is a potential witness for the defense.

. . .

MR. RAWLINS: . . . . I'm moving for a mistrial. Basically the People have elicited the fact that there is some fear of the witness.

THE COURT: You got him to say, aren't you testifying because you want to help out poor Joey Alvarez's mother. He didn't know what he was saying. I find [the petitioner's family] very menacing. I said to the Court Officers last week, and I'm not a fearful person, and I said I want to be escorted outside of this Courtroom.

MR. RAWLINS: What do you know about my client that would make you feel that way?

THE COURT: Nothing. Just the way they're presenting themselves. It's a public courtroom. They have a right to be here. I can make my observations. There's something about them, the way they look at this witness -- particularly in light of your cross that this is fair redirect. Plus the grand jury testimony. This man said he was threatened -- this defendant threatened all 3 of them. He threatened all 3 of them if they didn't give him Junior's whereabouts.

MR. RAWLINS: That's [Mr. Williams'] testimony. . . .

THE COURT: If the jury doesn't believe it that's fine. It is a question of fact for the jury to determine.

(Tr. 113-17).

2. Shawn Criss

On the night of the murder, the second eyewitness, Shawn Criss, was selling drugs six to seven feet away from Mr. Alvarez. According to Mr. Criss, the assailant walked up to the victim, said "You remember me, faggot," and shot him three or four times. (Tr. 138-39, 141, 143). Mr. Criss only glanced at the shooter and "didn't really look at him," but was able to tell that the shooter was "white, Spanish looking" and wearing a "hoody" covering his entire head. (Tr. 139, 141-43, 147). When asked at trial to identify the culprit, Mr. Criss stated that he did not recognize anybody even though the petitioner was in the courtroom. The prosecutor then asked, "Are you scared being here today?" and Mr. Criss agreed. (Tr. 142-43). Mr. Criss also admitted that he was facing felony drug charges but was allowed to plead to a misdemeanor after he agreed to testify for the prosecution. (Tr. 135-36).

3. Michael Jenkins

The last eyewitness presented by the prosecution was Michael Jenkins. Mr. Jenkins, who was also selling crack on 167th Street on the night of the murder, testified before the grand jury that he was unable to identify the shooter because the assailant's head was covered by a "hoody." (Tr. 180, 198-99). However, at trial he testified that the petitioner shot Mr. Alvarez (Tr. 183-84), even

though on cross-examination he admitted that he could not clearly see the shooter's face. (Tr. 192).

He also said that Mr. Williams was on the block when the shots were fired (Tr. 187), and that the only person standing near Mr. Alvarez was Mr. Criss. (Tr. 204). As with Mr. Criss, Mr. Jenkins was also facing drug charges that were reduced prior to his testifying. (Tr. 195-97).

B. Defense Witnesses

1. Carmen Rodriguez

At the time of the trial, Carmen Rodriguez was incarcerated at Rikers Island and was being held in the Contagious Diseases Unit ("CDU") because she had tested positive for tuberculosis. In light of her medical condition, the trial court took her testimony at the CDU and presented it to the jury via videotape. (Tr. 217, 314). Present at the facility were the trial judge, Justice Wittner; the prosecutor, Mr. Silberg; the defense attorney, Mr. Rawlins; the petitioner; Ms. Rodriguez; her attorney; the stenographer; and a video technician. At the start of the examination of Ms. Rodriguez, the judge said, "So the way we are going to do this is defendant will stay in this room, I will, you[5] and Mr. Silberg and Mr. Rawlins will be in the room with the witness and her attorney, Ms. Davidson." (Tr. 217). Ms. Rodriguez testified that she had known Mr. Alvarez for seven years and the petitioner for three to four years. Although she used drugs, she was not taking them when the shooting occurred. (Tr. 316, 318, 336). When Mr. Alvarez was

[5] It is unclear from the record who "you" refers to.

shot, she claimed she was standing two feet away but could not see the shooter's face clearly because he was wearing a hood. (Tr. 317, 341-42). Nevertheless, she knew it was not the petitioner because the shooter was short (approximately 5'2") and had dark skin. (Tr. 317-18, 331, 342).[6]

Prior to trial, Mr. Rawlins had invited the prosecution to interview Ms. Rodriguez in the hopes of getting the charges against the petitioner dismissed. (Tr. 214). When first interviewed by the prosecution, Ms. Rodriguez had maintained that the petitioner was not the shooter. (Tr. 25, 437). However, during a subsequent interview with Police Officer Michael Vasquez, she disclosed she had lied because the petitioner's father had promised to take care of her if she testified the petitioner was not the shooter. (Tr. 432-33, 435-36). She then gave a written statement implicating the petitioner as the shooter. (Tr. 434-35). During the examination at Rikers Island, Ms. Rodriguez claimed that this statement was not written by her and denied both that the petitioner's father ever contacted her and that the petitioner committed the murder. (Tr. 319, 324-29).

At the conclusion of the examination, the following occurred:

THE COURT: On the record. I want to put on the record Mr. Rawlins consulted with his client and gave him the opportunity to be in the room with Ms. Rodriguez and Mr.

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[6] The petitioner is apparently 5'11" and white. (Memorandum of Law in Support of the Petition for a Writ of Habeas Corpus ("Pet. Memo.") at 12 n.14).

Rawlins and he declined that. Is that right?

MR. RAWLINS: Yes.

THE COURT: You had an opportunity to talk to him both before and after?

MR. RAWLINS: Yes.

(Cond. Ex. Tr. 29).[7]

2. Alibi Witnesses

Just after the prosecution rested, Mr. Rawlins informed the court and the prosecution that he planned to call three alibi witnesses: the petitioner's grandmother, Julia Feci, and two friends of the petitioner, Roberto Cruz and Bernardo Rodriguez. (Tr. 222-23). Although Mr. Rawlins did not give the prosecutor alibi notices for the witnesses as required by state law, the prosecutor consented to both Ms. Feci and Mr. Cruz testifying because Ms. Feci had previously testified in the grand jury proceeding and had mentioned Mr. Cruz's name in her testimony, thus alerting the prosecution to the possibility of their being called as witnesses. The prosecutor, however, objected to Mr. Rodriguez testifying because he had been unable to interview this witness before trial since his name had never come up in any prior proceedings. (Tr. 222-23, 302-03).

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[7] "Cond. Ex. Tr." refers to the transcript from the Conditional Examination of Carmen Rodriguez included as Exh. D in Resp. App.

a. Julia Feci

Ms. Feci, who was 79 years old, testified that the petitioner was living with her at 640 171st Street at the time of the murder. That night the petitioner was home with several of his friends, and Ms. Feci was upset with them because they had damaged some of her furniture. (Tr. 228-29, 231-32). First, she said that one of the petitioner's friends, Roberto Cruz,[8] said good night to her at 10:15 p.m., at which point she checked in on the petitioner in his room. (Tr. 232). "A little while later" the petitioner came into her room to apologize for breaking a bed, and the two sat by the window and watched the conclusion of a television show that ended at 11:00 p.m. (Tr. 232-33, 246).[9] She later claimed Mr. Cruz said good night to her at 10:30 p.m. (Tr. 233, 243), and the petitioner came in to her bedroom at the same time and remained there until 11:00 p. m. (Tr. 234). Finally, she testified the petitioner did not come into her room until 10:45 p.m. and stayed until 11:00 p.m. to finish watching the program with her. (Tr. 244-47).

b. Roberto Cruz

According to Roberto Cruz, on January 12, 1993, he was at Ms. Feci's apartment with Robert and Nicholas Bohan and two other friends, Jason and Angel. (Tr. 253). Soon after 10:00 p.m., Ms. Feci threw the visitors out of the apartment because they had

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[8] Throughout Ms. Feci's testimony, she referred to Mr. Cruz by his nickname, "Pidge."

[9] Ms. Feci first testified that the program aired from 11:00 p.m. to 12:00 a.m. (Tr. 239), but her later testimony makes clear that the show was broadcast from 10:00 p.m. to 11:00 p.m. (Tr. 244-46).

broken a bed. He claimed he said good night to Ms. Feci at 10:05 p.m. and left ten minutes later with Angel and Jason. He arrived at home, which was across the street, before 10:30 p.m. (Tr. 254, 263-65). Later, he admitted he was not sure what time he left Ms. Feci's apartment but was confident he arrived home before 10:30 p.m. (Tr. 265, 269-70).

c. Dawson Hearing[10]

Before the prosecutor made any objection to the introduction of Bernardo Rodriguez's testimony, the trial court held a Dawson hearing to determine whether Mr. Rodriguez could be cross-examined about his failure to report the murder to the police. During the hearing, Mr. Rodriguez testified that on his way home from work the night of January 12, 1993, he spotted his friends, Roberto Cruz, Jason, Albert, and Angel, in front of 640 171st Street, and went over to greet them. (Tr. 283). They explained to him that Ms. Feci had thrown them out of her apartment, at which point Mr. Rodriguez looked up and observed the petitioner in the window of Ms. Feci's second-floor apartment. This was at approximately 10:10-10:15 p.m. Mr. Rodriguez said Roberto Cruz left the block early to go to work, but he remained with his friends on 171st Street until 11:00 or 11:15 p.m. (Tr. 284-85).

Mr. Rodriguez found out about the murder two days later from his brother-in-law, Charlie Abarka, also a friend of the petitioner's,

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[10] A Dawson hearing is held to determine whether the prosecutor may cross-examine a witness about the witness' failure to relay exculpatory information to law enforcement officials. See People v. Dawson, 50 N.Y.2d 311, 321, 428 N.Y.S.2d 914, 921, 406 N.E.2d 771 (1980).

but never went to the police. (Tr. 285-86, 288). After the petitioner's lawyer contacted Mr. Rodriguez, he gave the attorney a written statement about what had happened the night of January 12. (Tr. 289, 296). This statement, which had a fax date of March 10, 1994, was never provided to the prosecutor. (Tr. 297). Mr. Rawlins, the petitioner's third attorney, claimed that he had not taken the statement from Mr. Rodriguez although it was in his file. (Tr. 297-98). When questioned about the origin of the statement, Mr. Rodriguez responded that he made the statement at Mr. Rawlins' request sometime in 1993 or 1994 and then faxed it to him. (Tr. 300-01). He was emphatic about not having spoken with any other attorneys. (Tr. 301-02).

When the prosecutor indicated that he might not consent to Mr. Rodriguez testifying, Mr. Rawlins countered that the prosecution was selectively objecting to witnesses and did not want Mr. Rodriguez to testify because, unlike other witnesses, he did not have a criminal history. The judge responded, "[The prosecution is] bending over backwards so this won't later become ineffective assistance of counsel on appeal. I've ordered them to do more than they are required to do. I did more than I am required to do so this will not be overturned on an issue like that." (Tr. 305-06). Later Justice Wittner continued,

[The statement from Mr. Rodriguez] is a year sitting in a defense file since February '94. It is a 3 page written statement from a witness who you did not serve alibi notice. It is outrageous, not to mention the fact that you did not turn over the prior written statement. I'm precluding this witness. It's a clear violation of the Statute. And in my discretion you have not given me good cause why this man's name is not swerved [sic] as an alibi ruling.

(Tr. 308). Mr. Rawlins then tried to argue that Mr. Rodriguez was not an alibi witness because the time of the murder had not been established, an argument the judge quickly dismissed. (Tr. 309).

After a recess, Mr. Rawlins admitted that he had met with Mr. Rodriguez in 1994, but that because he was unfamiliar with Mr. Rodriguez's name and had not come across it in any of the records, he decided not do to anything further with the statement until the other alibi witnesses, with whom he was familiar, came forward. (Tr. 344-45). Mr. Rawlins then claimed to have forgotten about Mr. Rodriguez until he went back through his file the morning of the hearing, after one of the other alibi witnesses had contacted him. (Tr. 345).

The next day, the prosecution presented additional reasons why Mr. Rodriguez should not testify based on the investigation conducted after his identity was revealed. Mr. Silberg produced a photograph of Mr. Rodriguez's brother-in-law, Mr. Abarca,[11] and the petitioner brandishing guns, and stated that Mr. Abarca was involved in a drug gang with the petitioner. Based on this limited inquiry, Mr. Silberg argued that a more thorough investigation was needed. (Tr. 355-58). Justice Wittner then reaffirmed her ruling and precluded Mr. Rodriguez from testifying based on Mr. Rawlins' failure to show good cause for not having served any alibi notice. (Tr. 360).[12]

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[11] Mr. Silberg referred to Mr. Rodriguez's brother-in-law as Juan Abarca, whereas Mr. Rodriguez called him Charlie in his testimony. (Tr. 286, 356)

[12] One other witness, Jose Rivera, testified for the defense. Mr. Rivera, who was a friend of the petitioner's, stated that he was talking on a phone on

C. Prosecution's Closing Statement

During the prosecutor's summation, the following transpired:

MR. SILBERG: Now, speaking about Jamal Williams, I don't think anyone here has any doubt that Jamal Williams was not scared. I don't think anyone has any doubt that anyone who testifies in a criminal case who saw a murder would not be scared to testify. He indicated he was scared of the defendant and the defendant's people. Mr. Rawlins will tell you he still stayed in the neighborhood. He's still out on the street.

Ladies and gentlemen, ... you observed him when he broke down crying. Wasn't that because he was scared? When he couldn't go on wasn't it because he was scared? Ask yourselves, ladies and gentlemen, was Jamal Williams lying to you or was he scared about the consequences of him testifying and pointing someone out in a murder trial. Also make no mistake when he pointed out the defendant who else was

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167th Street when the murder occurred. Although he could not identify the shooter, he maintained that it was not the petitioner. (Tr. 364-65, 403, 415).

in the audience? The defendant's father and the defendant's brother [were] in the audience. It's not an enviable task to sit on the stand and point out the murderer with his family even sitting right behind him. You better believe Jamal Williams was scared as anyone would be scared.

. . .

Now, Mr. Jenkins was an interesting witness because Mr. Jenkins was considerably more self-assured, more confident, he didn't break down crying, didn't get upset and one thing you might want to notice is when you compare Jamal to Jenkins, when Jamal testified he told you he was scared to death. Mike Jenkins didn't indicate he was too scared. One of the differences between when Jamal testified and when Mike Jenkins testified is the defendant's father was present when Jamal testified, defendant's brother was present when Jamal testified, and neither one of them were present when Mike Jenkins testified, so consider the fact how much pressure there was on Jamal and how much less pressure there was on Mike because while he had to face [the] defendant, he didn't have to face [the] defendant's

family. He didn't have to worry about that.

MR. RAWLINS: Objection.

THE COURT: Sustained to the last part.

. . .

MR. SILBERG: [Mr. Criss] didn't identify the defendant. Whether Mr. Criss actually saw the person's face is something for you to determine or whether he was just too scared to say who the person was is something for you to consider.

(Tr. 493-94, 505, 513-14).

D. Verdict and Sentence

On July 13, 1995, the jury found Mr. Bohan guilty of murder in the second degree. (Tr. 351, 570). He was later sentenced to the maximum term of imprisonment, twenty-five years to life. (Sent. Tr. 19-20).[13] Throughout the sentencing proceeding, the petitioner maintained his innocence. (Sent. Tr. 14-16). In handing down her sentence, Justice Wittner found that

when a young man commits a murder like this without provocation, after he's been in Family Court, after he's been in the

[13] "Sent. Tr." refers to the transcript from the sentencing proceeding held on October 11, 1995.

Dome Project, after he's had probation, I have no other choice but to give a sentence that I feel reflects the seriousness, the violence [of] this crime, and the lack of remorse of this defendant.

(Sent. Tr. 19).

E. Post-trial Proceedings

On March 19, 1998, Joel Brenner, the petitioner's current attorney, filed an appeal on Mr. Bohan's behalf. He argued that: (1) the conviction was not supported by sufficient evidence; (2) Mr. Bohan received ineffective assistance of counsel; (3) his right to be present during all material stages of the trial had been violated; (4) the prosecutor committed misconduct throughout the trial; (5) a ruling allowing the prosecutor to question the petitioner about his previous drug dealing was reversible error; (6) preclusion of testimony from an alibi witness violated Mr. Bohan's right to present a defense both under the state Constitution and the Sixth Amendment of the federal Constitution; and (7) his sentence was excessive.

The Appellate Division, First Department affirmed the conviction, finding that (1) there was sufficient evidence of guilt; (2) on the existing record the defendant received "meaningful representation;" (3) the conditional examination of Carmen Rodriguez was "unreviewable" because the petitioner failed "to provide a sufficient record to establish that the special seating arrangements deprived him of the right to be present" and because he had waived his right to be situated in the same room as the witness; (4) "the trial court properly exercised its discretion in precluding [the] defendant from calling a third alibi witness, since

the defense concededly failed to give proper alibi notice . . . and since [the prosecution was] deprived of the opportunity to conduct a proper investigation regarding any of the alibi testimony;" (5) there was no "abuse of sentencing discretion" and the sentence was "not based on any improper criteria;" and (6) all remaining contentions were meritless. People v. Bohan, 257 A.D.2d 443, 443-44, 684 N.Y.S.2d 514, 515 (1st Dep't 1999). On March 15, 1999, the Court of Appeals denied leave to appeal. People v. Bohan, 93 N.Y.2d 871, 689 N.Y.S.2d 433 (1999). Mr. Bohan then filed the instant petition.

F. Hearing in Federal Court

I held a hearing on August 2 and October 1, 2001, to determine whether Bernardo Rodriguez's testimony would have been cumulative had he been permitted to testify at trial and to explore the circumstances of Mr. Rawlins' failure to serve any alibi notice. The petitioner also elicited testimony about the examination of Carmen Rodriguez. The following is a summary of testimony given at the hearing.

1. Robert Bohan

Mr. Bohan testified he told Mr. Rawlins about his alibi and the names of witnesses who could verify his whereabouts including, Jason, Angel, Albert, Ms. Feci, Roberto Cruz, and Bernardo Rodriguez. (First Fed. Tr. 13).[14] Contrary to what he said to the grand jury, Mr. Bohan claimed that his friends all left the house

[14] "First Fed. Tr." refers to the transcript from the hearing held before the Court on August 2, 2001.

around 10:15 p.m.[15] (First Fed. Tr. 18, 23). According to Mr. Bohan, Mr. Rawlins acknowledged at sentencing that he had "fucked up" the alibi. (First Fed. Tr. 14).

Mr. Bohan also said that during the examination of Carmen Rodriguez, he and the video technician were in a separate room from Ms. Rodriguez, the judge, and counsel. (First Fed. Tr. 33). The rooms were separated by a plexiglass window so that all parties could see each other and speakers were set up so that the petitioner could hear the proceeding. (First Fed. Tr. 21-22, 33-35). Mr. Bohan denied that Mr. Rawlins asked him if he wanted to be seated in the same room during the examination and denied ever hearing Mr. Rawlins waive his right to be present. (First Fed. Tr. 33-34).

2. Bernardo Rodriguez

Mr. Rodriguez testified he had lived on 172nd Street his whole life. At the time of the hearing, he was an instructor at Intermediate School 90 and a candidate to become a police officer in the Suffolk County Police Department. (First Fed. Tr. 67-68). He had no criminal history but was issued a summons for turnstile jumping, which was subsequently dismissed. (First Fed. Tr. 76-77).

His testimony regarding the night of January 12, 1993, was very similar to that which he gave at the Dawson hearing in state

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[15] In the grand jury proceedings, the petitioner testified that Roberto Cruz and Albert did not leave the apartment until around 11:00 p.m., and Angel and Jason stayed until after 11:00 p.m. to help fix the bed. (Grand Jury Testimony of Robert Bohan, included as Exh. G in Resp. App., at 30, 125).

court. Mr. Rodriguez said that after he got off work at City College, he went to 171st Street. He arrived there sometime around 10:10 p.m. (First Fed. Tr. 70). Roberto Cruz explained to him that several of their friends had gotten thrown out of Mr. Bohan's apartment. (First Fed. Tr. 72, 91). He then looked up at the window at approximately 10:15 p.m. and saw the petitioner and his grandmother in a window that faced out onto the street on the second floor of the building. (First Fed. Tr. 72-73, 91-92). In addition to Mr. Cruz, Angel, Jason, and Albert were also on the street. (First Fed. Tr. 89). Mr. Cruz left soon after Mr. Rodriguez arrived, and when Mr. Rodriguez left at 11:15 p.m,[16] only Albert and Angel were still on the street. (First Fed. Tr. 74, 87-88, 94-95).

3. Michael Vasquez

Officer Michael Vasquez stated that he interviewed Albert Montilla, Jason Pena, Angel Zapata, and Roberto Cruz about the petitioner's alibi.

Albert Montilla, who was fourteen at the time of the interview, gave a signed statement detailing how from 8:30 to 11:30 p.m. he was with the petitioner, Roberto, Jason, and Angel at the Bohans' apartment. (First Fed. Tr. 108, 117). Also present in the home were the petitioner's grandmother, mother, and one sister. (First Fed. Tr. 127). According to Mr. Montilla, he stayed until 11:30 p.m., but Mr. Cruz left at 10:30 p.m. (First Fed. Tr. 108; Resp. Exh. B).[17]

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[16] During the hearing, it came out that in a previous statement given by Mr. Rodriguez he claimed to have left the block to go home at 10:45 p.m. (First Fed. Tr. 88).

[17] "Resp. Exh." refers to exhibits admitted during the evidentiary hearing held in this Court.

There was no mention of Bernardo Rodriguez in his statement. (First Fed. Tr. 109).

Jason Pena, who was fifteen at the time of the interview (First Fed. Tr. 123), gave a signed statement declaring that he had arrived at the Bohans' apartment at around 8:00 or 8:30 p.m. and stayed until 12:30 a.m. with Angel to fix the broken bed. Mr. Cruz left earlier, at 10:00 or 10:30 p.m., and Albert left at 11:00 or 11:20 p.m. (First Fed. Tr. 110; Resp. Exh. C). Mr. Pena did not mention Mr. Rodriguez, Ms. Feci, or any other Bohan family members. (First Fed. Tr. 124-25).

In his signed statement, Angel Zapata, who was fifteen at the time, reported that he was in the Bohans' apartment from 8:30 p.m. to approximately 12:30 a.m. with the petitioner, Roberto Cruz, Albert, Jason, and Nicholas Bohan. (First Fed. Tr. 111-12, 126). Roberto left at around 10:30 p.m.; Albert left at approximately 11:30 p.m.; and Jason and he left at about 12:30 a.m. (First Fed. Tr. 112). There was no mention of Mr. Rodriguez or Ms. Feci having been present, but Mr. Zapata did state that Mr. Bohan's sisters were in the apartment. (First Fed. Tr. 112; Resp. Exh. D).

Officer Vasquez also interviewed Roberto Cruz, but was called to another crime scene and was unable to have Mr. Cruz complete or sign his statement. Nevertheless, Mr. Cruz, who was 23 years old at the time of the interview, did tell the officer that he arrived at the apartment at 8:00 or 8:30 p.m., and stayed there with Albert, Jason, Angel, Nicholas, and the petitioner. (First 113-14, 128). While there, he overheard an argument between the petitioner and his grandmother about a broken bed. (Resp. Exh. E). He left to go

home around 10:30 p.m., leaving Robert and his friends. (Resp. Exh. E).

It is unclear from the written police reports whether Officer Vasquez or his partner ever asked the witnesses if they saw anyone on the street after leaving the apartment. (First Fed. Tr. 120, 133).

4. Stuart Silberg

Mr. Silberg testified that Mr. Rawlins first notified him that he would be calling alibi witnesses during a discussion off the record that took place before the jury had been selected, approximately seven to ten days before Mr. Rawlins attempted to call Mr. Rodriguez as a witness. (First Fed. Tr. 40-42, 45-46). It is unclear if Mr. Rawlins gave Mr. Silberg any of the names of these witnesses at that time, although it is undisputed that he did not disclose Mr. Rodriguez's name.[18] After the prosecution had rested, Mr. Rawlins informed the court he wanted to call Mr. Rodriguez as a witness. That same day Mr. Silberg ran a rap sheet on him. (First Fed. Tr. 45-46; Tr. 303, 305). Mr. Silberg also contacted a police investigator for information about a relative of Mr. Rodriguez's who was a friend of the petitioner's and who was apparently involved in dealing drugs. (First Fed. Tr. 46). During the 24-hour period between the time Mr. Silberg first became aware of Mr.

[18] In the federal court proceeding, Mr. Silberg intimated that he was specifically aware of Mr. Rodriguez before the jury was selected. (First Fed. Tr. 40-41, 45-46). However, the trial transcript makes clear that Mr. Silberg first heard of Mr. Rodriguez the same day as the Dawson hearing, July 12, 1995, seven days after the jury was selected. (Tr. 303, 355; Post-Hearing Memorandum in Support of Answer Opposing Petition for a Writ of Habeas Corpus ("Resp. Post-Hearing Memo."), at 8 n.8).

Rodriguez and when the trial judge precluded his testimony, Mr. Silberg never sought to interview Mr. Rodriguez. (First Fed. Tr. 50, 63-64).

5. Earl Rawlins

Mr. Rawlins testified that he never gave written alibi notice but that he did have conversations with Mr. Silberg prior to the trial about calling alibi witnesses. (Second Fed. Tr. 3-4).[19] He claimed his failure to give notice was not motivated by any desire to gain tactical advantage, but rather because he had forgotten about the alibi witnesses until he reviewed his file immediately before the trial. (Second Fed. Tr. 4, 11). When asked why he did not give notice as soon as he realized he had a statement from Mr. Rodriguez giving the petitioner an alibi, Mr. Rawlins responded, "At that point, I just told Mr. Silberg, I recall, I have this person here, and then that's it. I don't recall what I -- no, I'm not sure what I did or not, to tell you the truth." (Second Fed. Tr. 4).

On cross-examination Mr. Silberg tried to elicit testimony about defense counsel's possible motivation for failing to provide notice and suggested that Mr. Rawlins did not give notice because of his experience with Carmen Rodriguez who had changed her testimony after speaking to the prosecution. When Mr. Silberg tried to present this theory of Mr. Rawlins' failure to provide notice, the following exchange occurred:

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[19] "Second Fed. Tr." refers to the transcript from the hearing held before this Court on October 1, 2001.

MR. SILBERG: So would it be fair to say as a result of you giving us a witness [Carmen Rodriguez] whom you thought might convince us to dismiss the case that that didn't happen?

MR. RAWLINS: The case was not dismissed, that's correct.

MR. SILBERG: Now, when you became aware of Bernardo Rodriguez, were you a little wary about letting us have information about him, because you were afraid that that wouldn't work out well if we had an opportunity to speak to Mr. Rodriguez?

MR. RAWLINS: No, it's the contrary. As I reviewed the letter -- I would be more than happy to give you that letter so you could check it out, yes.

(Second Fed. Tr. 7). Mr. Rawlins denied that he disbelieved Mr. Rodriguez's account of the events. (Second Fed. Tr. 9). He maintained he did not attempt to call the other alibi witnesses -- Jason, Albert, and Angel -- because he thought they were in jail at the time. (Second Fed. Tr. 8).[20]

[20] This is confirmed in part by the state trial transcript, which indicates that Jason and Angel were incarcerated at the time of the trial. (Tr. 260-61, 275-76).

Mr. Rawlins also acknowledged that his failure to give alibi notice was a mistake:

MR. SILBERG: Did you go back and tell [Mr. Bohan] that -- if you'll pardon my language, that you fucked up with the alibi in the case? Do you remember telling him that?

MR. RAWLINS: Using the word fucked up, I don't know. I would certainly mention the fact that that would be an appealable issue, yeah, and I spoke to him about it, oh, yeah.

MR. SILBERG: That you might have mentioned to him, in discussing what the next steps would be, that in filing an appeal that would be an issue.

MR. RAWLINS: Yeah.

MR. SILBERG: But you don't have a direct recollection of telling him that you made a mistake in handling [the] alibi.

MR. RAWLINS: I don't recall telling him, but it certainly was a mistake.

(Second Fed. Tr. 10).

Finally, when questioned about whether he had asked the petitioner to sit at the counsel table during the interview with

Carmen Rodriguez, he answered that he had no recollection. (Second Fed. Tr. 4-5).

Discussion [21]

A. Insufficient Evidence

Mr. Bohan claims there is insufficient evidence of his guilt. He maintains that the testimony of the alleged eyewitnesses was internally contradictory and was belied by other prosecution witnesses. This argument is without merit.

There is a "very heavy burden placed upon a defendant challenging the sufficiency of the evidence underlying his conviction." Knapp v. Leonardo, 46 F.3d 170, 178 (2d Cir. 1995) (internal quotations and citation omitted). To succeed the petitioner must demonstrate that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); see also Quartararo v. Hanslmaier, 186 F.3d 91, 97 (2d Cir. 1999), cert. denied, 528 U.S. 1170, 145 L. Ed. 2d 1100, 120 S. Ct. 1196 (2000); Knapp, 46 F.3d at 178.

In this case, two eyewitnesses, Michael Jenkins and Jamal Williams, testified that it was the petitioner who shot Mr. Alvarez. Any inconsistent or contradictory testimony by these witnesses

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[21] Because the claims unrelated to the preclusion of the alibi witness fail under de novo review, it is unnecessary to discuss whether the Anti-Terrorism and Effective Death Penalty Act's more deferential standard applies to them. See 28 U.S.C. § 2254(d)(1).

does not render their identification of Mr. Bohan incredible, because the evidence must be construed in the light most favorable to the prosecution and this Court must defer to the jury's resolution of any conflicts in the testimony and its assessment of witness credibility. See Jackson, 443 U.S. at 319.

With regard to the defense witnesses, a rational juror could have discounted Carmen Rodriguez's testimony that Mr. Bohan was not the assailant because she changed her account of the events twice. One of the alibi witnesses, Mr. Cruz, last saw the petitioner before the crime occurred and could not vouch for his whereabouts at the time of the shooting, while the other witness, Ms. Feci, provided several time-frames for the critical events, at least one of which did not provide an alibi for the petitioner. Finally, three prosecution witnesses testified that the petitioner had met with the victim, and one of them, Mr. Williams, stated that the petitioner had threatened Mr. Alvarez, providing a motive for the killing. Based on all of this evidence, and in particular the eyewitness identifications of the petitioner, a rational juror could have found him guilty beyond a reasonable doubt.

B. Right to be Present During All Material Stages of Trial

The petitioner argues that his absence from the room at Rikers Island while Carmen Rodriguez was interviewed by the judge and counsel violated his right to be present during all material stages of the trial. Although his attorney stated on the record that the petitioner had waived his right to be present, Mr. Bohan denies that counsel spoke to him about this issue. The respondent counters that this claim is not exhausted and should be dismissed or, in the

alternative, that it fails on the merits. Although this claim is exhausted, it is meritless.

1. Exhaustion

Pursuant to 28 U.S.C. § 2254(b)(1)(A), a petitioner must exhaust all state remedies to the highest state court. See also Gonzalez v. Sullivan, 934 F.2d 419, 422 (2d Cir. 1991); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190-91 & n.3 (2d Cir. 1982). To achieve exhaustion, the petitioner must inform the state court of both the legal and factual bases of the claim before proceeding in federal court. See Daye, 696 F.2d at 191; see also Strogov v. Attorney General of the State of New York, 191 F.3d 188, 191 (2d Cir. 1999), cert. denied, 530 U.S. 1264, 147 L. Ed. 2d 987, 120 S. Ct. 2723 (2000).

Although the petitioner raised this claim on appeal, the respondent maintains that it is not exhausted because the Appellate Division found the claim "unreviewable" due to the petitioner's failure to provide a "sufficient record to establish that the special seating arrangements deprived him of the right to be present." Bohan, 257 A.D.2d at 443, 684 N.Y.S.2d at 515. While the Appellate Division may have wished for more details about where the parties sat during the examination of Ms. Rodriguez, the petitioner did raise both the legal and factual bases of his claim in state court: he alleged that he sat in a different room from Ms. Rodriguez during the examination thus denying him his right to be present in violation of the Sixth Amendment. Although the exact seating arrangements and the configuration of the rooms are unknown, it is clear from the state record that Mr. Bohan could both hear and see the examination of Ms. Rodriguez and that she

could see him,[22] facts sufficient for the state court to have made a decision on the merits of the claim. Therefore, the petitioner exhausted his state court remedies.

Furthermore, the Appellate Division did reach the merits in an alternative holding, stating that "in any event, the existing record establishes that defendant waived his right to be situated in closer proximity to the witness and counsel." Id. at 443-44, 684 N.Y.S.2d at 515. However, the petitioner did not argue in state court that defense counsel failed to obtain his consent to waive his presence at the proceeding, nor did Mr. Bohan present any evidence to this effect to the Appellate Division. Nevertheless, as discussed below, the waiver issue is not dispositive of this claim; therefore, it is of no matter that the factual predicate for the waiver issue was not exhausted in state court.

2. Merits

The petitioner's Sixth Amendment claim raises four issues: whether Mr. Bohan's right to be present was violated when Ms. Rodriguez was examined in a separate room; whether Mr. Bohan validly waived his right to be present; whether harmless error analysis applies to the claim; and, if so, whether the error was indeed harmless. Because harmless error analysis does apply and

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[22] The state transcript reflects that the judge and counsel were in the interview room with Ms. Rodriguez, while the video technician, stenographer, and the defendant were in a separate room. (Tr. 217-19, Cond. Ex. Tr. 4). This indicates that the petitioner could both see and hear the examination of Ms. Rodriguez. The prosecutor also had to remind Ms. Rodriguez to look at him rather than at the petitioner, again confirming that the parties in the two rooms could see each other. (Tr. 327, 329).

the error was harmless, it is unnecessary to rule on the first two issues. See Yarborough v. Keane, 101 F.3d 894, 896 (2d Cir. 1996).

Violations of the right to be present during all material stages of the trial may be subject to harmless error analysis. United States v. Feliciano, 223 F.3d 102, 111-12 (2d Cir. 2000), cert. denied, 532 U.S. 943, 149 L. Ed. 2d 348, 121 S. Ct. 1406 (2001); Yarborough, 101 F.3d at 896; United States v. Vilella, 49 F. Supp. 2d 232, 238 (S.D.N.Y. 1999); see also Rushen v. Spain, 464 U.S. 114, 119 n.2, 78 L. Ed. 2d 267, 104 S. Ct. 453 (1983) ("Violations of the right to be present during all critical stages of the proceedings [are, in most cases] subject to harmless error analysis."). However, if the violation "so fundamentally undermine[s] the fairness or the validity of the trial," it is properly characterized as a "structural" error and is subject to automatic reversal. Yarborough, 101 F.3d at 897; see also Arizona v. Fulminante, 499 U.S. 279, 307-10, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991). "To determine whether an error is properly categorized as structural, we must look not only at the right violated, but also at the particular nature, context, and significance of the violation." Yarborough, 101 F.3d at 897.

Mr. Bohan's absence from the examination room during the questioning of Ms. Rodriguez certainly did not undermine the fairness or the validity of the trial. He was able to see and hear the entire interrogation of Carmen Rodriguez, and his attorney was present in the examination room. There is no indication in the record that the petitioner was impeded from consulting with counsel either before or after the examination. Accordingly, his exclusion from the examination room, assuming it was an error, is subject to harmless error analysis. See Feliciano, 223 F.3d at 112

(conducting portion of voir dire outside hearing of defendants subject to harmless error analysis where defendants present during entire jury selection process and were provided with opportunity to consult with counsel); Yarborough, 101 F.3d at 898 (holding brief hearing, not part of trial proper, in defendant's absence subject to harmless error standard); Vilella, 49 F. Supp. 2d at 238 (colloquy following outburst by co-defendant in the absence of defendant and his attorney subject to harmless error where defendant given copy of transcript from meeting).

Mr. Bohan has failed to demonstrate that the alleged violation adversely affected his trial. He has not made any showing that his presence in the same room as the witness would have altered the proceeding, nor has he demonstrated that his sitting in a separate room had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); see also Almanzar v. Portuondo, 1999 U.S. Dist. LEXIS 11602, No. CV-97-1859, 1999 WL 557517, at *6 (E.D.N.Y. July 29, 1999) (harmless error if no evidence that defendant "could have done anything had he been at the hearing nor would he have gained anything by attending") (quoting Kentucky v. Stincer, 482 U.S. 730, 747, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987)). Because Mr. Bohan has not shown that the alleged violation resulted in anything other than harmless error, this claim should be rejected.

C. Prosecutorial Misconduct

The petitioner next argues that the prosecutor was improperly permitted to elicit testimony from two witnesses, Jamal Williams and Shawn Criss, that they were fearful of him. In his closing

argument, the prosecutor then emphasized this testimony. Mr. Bohan also alleges that the prosecutor impermissibly shifted the burden of proof onto the defense and vouched for the testimony of another witness, Officer Vasquez, in his summation.

1. Testimony Regarding Fear

An erroneous evidentiary ruling by a state trial court judge rises to the level of a constitutional claim cognizable on federal habeas review only if it implicates the fundamental fairness of the trial. Dowling v. United States, 493 U.S. 342, 352-53, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998); Roberts v. Scully, 875 F. Supp. 182, 189 (S.D.N.Y. 1995). The erroneously admitted evidence is subject to harmless error analysis such that the evidence must have been "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." Dunnigan, 137 F.3d at 125 (citation omitted). The principal factors to be considered are "the importance of the witness's wrongly admitted testimony, and the overall strength of the prosecution's case." Wray v. Johnson, 202 F.3d 515, 526 (2d Cir. 2000).

With regard to Mr. Williams' testimony, there is not even a threshold showing that the trial court's ruling was erroneous. It was not improper for the trial court to admit testimony about the witness' fear of the defendant since it bore on his credibility as a witness, especially given the threat Mr. Bohan had made to Mr. Williams. See United States v. Qamar, 671 F.2d 732, 736 (2d Cir. 1982) (testimony as to death threats admissible on direct examination where determination of credibility of witnesses was

central to case and defendant and government witnesses gave inconsistent accounts); Unites States v. Cirillo, 468 F.2d 1233, 1240 (2d Cir. 1972) (permissible to elicit testimony on redirect that witness' failure to initially provide officers with complete statement was due to death threat by defendant). The petitioner argues that there was no evidence that he had done anything to frighten the witnesses, and it was therefore improper and prejudicial to make it seem as if he had corrupted the judicial process. (Pet. Memo. at 42). However, Mr. Williams explicitly stated that Mr. Bohan had threatened to "get" him if he did not help Mr. Bohan find Junior, a threat that, according to the prosecutor, led to the death of Mr. Alvarez. (Tr. 71).

Mr. Williams was emotional throughout his testimony on cross-examination, crying at several points. He also agreed with defense counsel that he was testifying for the "sole purpose of helping [the victim's] mother." (Tr. 111). The trial judge cited to these instances, in addition to the threat Mr. Bohan had made to the witness, in allowing the testimony about Mr. Williams' fears. (Tr. 114-17).

The state court's holding is consistent with federal law that allows redirect testimony about subjective fears where "cross-examination has been used to elicit an incomplete picture which gives a distorted impression of a witness's credibility." United States v. Panebianco, 543 F.2d 447, 455 (2d Cir. 1976); see also United States v. Spears, 827 F.2d 705, 708 (11th Cir. 1987) ("witnesses' subjective fears and beliefs which resulted in the prior inconsistent statement" are admissible) (citing United States v. Franzese, 392 F.2d 954, 960 (2d Cir. 1968)). Thus, the petitioner has not established that there was an erroneous evidentiary ruling.

The admission of Mr. Criss' testimony about being fearful, even if it was an evidentiary error of constitutional proportions, had a negligible effect, if any, on the jury's verdict.[23] The prosecutor asked Mr. Criss if he was scared immediately after Mr. Criss stated that he could not identify the shooter, implying that Mr. Criss' inability to pick out the shooter arose from his fear of the defendant. (Tr. 143). Mr. Criss' testimony about his fears neither "provided the basis for conviction" nor would "a reasonable doubt . . . have existed on the record without it." Dunnigan, 137 F.3d at 125 (citations omitted). Therefore, the petitioner has not satisfied the harmless error standard.

2. Prosecutor's Summation

A writ of habeas corpus will not issue on the basis of prosecutorial misconduct during summation unless the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974); see also Tankleff v. Senkowski, 135 F.3d 235, 252 (2d Cir. 1998). To revail, the petitioner "must demonstrate that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." Bentley v. Scully, 41 F.3d 818, 824 (2d Cir. 1994). The misconduct Mr. Bohan alleges either was not improper or did not cause sufficient prejudice.

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[23] The trial court never explicitly ruled on the admissibility of Mr. Criss' testimony about being scared because defense counsel never objected to it. (Tr. 143).

First, a prosecutor may comment on properly admitted evidence in his closing argument. United States v. Myerson, 18 F.3d 153, 163 (2d Cir. 1994); see also United States v. Rivera, 971 F.2d 876, 885 (2d Cir. 1992) (prosecutor entitled to comment on the demeanor of a witness, including fact that witness appears fearful). As explained above, the testimony about Mr. Williams being fearful was permissible; therefore it was appropriate for the prosecutor to discuss his testimony in his summation. And since, at worst, Mr. Criss' testimony was harmless error, its reiteration in the prosecution's closing statement was equally harmless.

Mr. Bohan next alleges that the prosecutor implicitly shifted the burden of proof to the defense, by pointing out in his closing argument that other witnesses supposedly present in the home of Ms. Feci at the time of the murder had not been called as witnesses. But, "once a defendant comes forward with evidence, the prosecution generally may comment on his failure to call an available witness who is under his control and whose testimony may be material." Tankleff, 135 F.3d at 251. Thus, there was nothing improper about the prosecutor's observation that Mr. Bohan had declined to call the other people he claimed to be alibi witnesses.

Mr. Bohan then argues that the prosecutor's statement, "Don't forget to consider the defendant's case as to whether you believe it or not" (Tr. 524), constituted improper burden shifting because it implied that the weak defense evidence should be construed as evidence of the petitioner's guilt. Regardless of whether this statement was appropriate, the petitioner has failed to demonstrate that it prejudiced the jury to such an extent as to render the trial unfair under the harmless error standard. See United States v.

Cruz, 797 F.2d 90, 93 n.1 (2d Cir. 1986) (prosecutor's statement that "the defense has to convince you" found to be "misstatement" but did not deprive defendant of a fair trial).

Finally, the petitioner claims that the prosecutor improperly vouched for Officer Vasquez's credibility when he stated, "I'll bank with you on the fact that you are going to believe Detective Vasquez over [Carmen] Rodriguez." (Tr. 521). However, a prosecutor may comment on the evidence presented and ask the jury to draw inferences from it. See Myerson, 18 F.3d at 163 (attorneys have substantial latitude to suggest that inferences be drawn from evidence as long as evidence is not misstated). Therefore, Mr. Bohan has not shown that he is entitled to habeas relief based on prosecutorial misconduct.

D. Illegal Sentence

The petitioner next alleges that the trial court violated his right to go to trial by imposing a harsher sentence as a result of his failure to express remorse. The respondent counters that the claim is unexhausted and meritless. In fact, it is exhausted but without merit.

1. Exhaustion

As stated previously, to achieve exhaustion, the petitioner must inform the state court of both the legal and factual bases of the claim before proceeding in federal court. See Daye, 696 F.2d at 191; see also Strogov, 191 F.3d at 191. The respondent argues that the petitioner did not argue on appeal that his sentence violated his Fifth Amendment rivilege against self-incrimination, and,

therefore, this Court is barred from reviewing the claim. (Memorandum of Law in Support of Answer Opposing Petition for Writ of Habeas Corpus ("Resp. Memo.") at 33-34). However, the petitioner's state appellate brief cites the Fifth and Fourteenth Amendments and relies on federal cases that discuss both the Fifth Amendment's protection against self-incrimination and the Fourteenth Amendment's due process provisions. (Petitioner's Appellate Brief ("Pet. App. Br."), included as Exh. A in Resp. App., at 54-56); see Daye, 696 F.2d at 194 (exhaustion achieved where state appellate brief relies "on pertinent federal cases employing constitutional analysis"). Indeed, the petitioner's brief raises the same argument put forward in the instant habeas petition with respect to Mr. Bohan's sentence. (Pet. App. Br. at 54-57). Accordingly, this claim is exhausted.

2. Merits

The petitioner maintains the state court improperly imposed the maximum sentence, twenty-five years to life, in response to his continued assertion of his innocence and his failure to express remorse at sentencing. This, Mr. Bohan argues, amounts to a violation of the Fifth Amendment right against self-incrimination and the Fourteenth Amendment right to trial because the state court impermissibly used his lack of remorse as a basis for imposing a more severe sentence. (Pet. Memo. at 52-53).

While the Fifth Amendment provides a "safeguard against judicially coerced self-disclosure" that extends to the sentencing phase of a criminal proceeding, Mitchell v. United States, 526 U.S. 314, 322, 143 L. Ed. 2d 424, 119 S. Ct. 1307 (1999) (quotation omitted), it does not bar a court from considering a defendant's

lack of remorse. Geraci v. Senkowski, 23 F. Supp. 2d 246, 267-68 (E.D.N.Y. 1998), aff'd, 211 F.3d 6 (2d Cir.), cert. denied, 531 U.S. 1018, 148 L. Ed. 2d 497, 121 S. Ct. 581 (2000) ("A sentencing judge may properly consider a defendant's remorse, or lack thereof, in determining a sentence. Doing so does not infringe a defendant's Fifth Amendment rights."). Indeed, courts routinely consider a defendant's failure to accept responsibility in making sentencing decisions. See United States v. Li, 115 F.3d 125, 134-35 (2d Cir. 1997) (not improper to impose harsher sentence than originally contemplated as result of defendant's protestations of innocence where court found her conduct manipulative and defendant failed to accept responsibility); El v. Artuz, 105 F. Supp. 2d 242, 255 (S.D.N.Y. 2000).

Nevertheless, the petitioner maintains that courts may only rely on a defendant's lack of remorse to decline to impose a more lenient sentence, but not as the basis for imposing a more severe one. The petitioner's argument fails for several reasons. First, almost all of the cases cited by the petitioner involve issues of whether the court improperly penalized defendants for not cooperating with the government following conviction. See United States v. Rivera, 201 F.3d 99, 101-02 (2d Cir. 1999), cert. denied, 531 U.S. 901 (2000); United States v. Oliveras, 905 F.2d 623, 626 (2d Cir. 1990); Mallette v. Scully, 752 F.2d 26, 30-31 (2d Cir. 1984). In this case, there is no indication that the judge coerced the petitioner by offering a more lenient sentence in exchange for providing assistance to law enforcement. Rather, the judge, in commenting on the necessity for a severe punishment based on the petitioner's character and past behavior, noted that he had failed to accept responsibility for the crime. (Sent. Tr. 19). Under these circumstances, it is doubtful that there was sufficient judicial

coercion to constitute a Fifth Amendment violation. Cf. Rivera, 201 F.3d at 101-02 (five year increase of defendant's sentence based on his refusal to cooperate with the government post-conviction violated his right to remain silent); Oliveras, 905 F.2d at 626 (defendant could not be denied an acceptance of responsibility reduction in offense level merely because he refused to make self-incriminating statements relating to conduct included in counts to which he had not pled guilty and which were dismissed as part of his plea agreement, and for which he had not been immunized from further prosecution).

Second, the petitioner has made no showing that Justice Wittner was imposing a more severe punishment rather than declining to grant leniency. Compare United States v. Perez, 904 F.2d 142, 146 (2d Cir. 1990) (longer sentences imposed after third trial not result of vindictiveness), and Mallette, 752 F.2d at 30 (insufficient finding of enhancement where "record shows only that the judge declined to show leniency"), with Rivera, 201 F.3d at 101 (illegal enhancement where judge stated that "I . . . regard his failure to come forward and assist the government in its investigations following his conviction in this case as affecting the point within the guideline range to which I am sentencing him. . . . I am attributing in my mind [five years] to his failure to assist the government postconviction"), and Oliveras, 905 F.2d at 626 (impermissible denial of "acceptance of responsibility" sentence reduction where defendant refused to make self-incriminating statements about crimes not relating to actual charges). Accordingly, this claim should be denied.

E. Ineffective Assistance of Trial Counsel

Mr. Bohan details numerous errors supporting his claim of ineffective assistance of counsel. The respondent contends that this claim is unexhausted and should be dismissed or, in the alternative, fails on the merits.

1. Exhaustion

The respondent argues that the petitioner should have presented this claim to the state courts in a motion filed pursuant to New York Criminal Procedure Law ("CPL") § 440. (Resp. Memo. at 31). There is no requirement, however, that a petitioner commence a collateral proceeding, such as a CPL § 440 motion. Rather, to achieve exhaustion a petitioner need only raise the claim on direct appeal, even if other state remedies remain available. See Ylst v. Nunnemaker, 501 U.S. 797, 805, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) (prisoner "exhausted his Miranda claim by presenting it on direct appeal, and was not required to go to state habeas at all"). In this case, Mr. Bohan raised ineffective assistance of trial counsel in his direct appeal to the Appellate Division, and this claim was denied further review by the Court of Appeals. The petitioner has, therefore, exhausted his state remedies.

2. Merits

In order to obtain a reversal of a conviction for ineffective assistance of counsel, a petitioner must demonstrate that: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). When reviewing trial counsel's performance, a habeas corpus court must be "highly deferential" and "indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Id. at 689. The court must not rely upon hindsight and second-guess counsel's unsuccessful trial strategy. Id. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690.

With respect to the first prong of the Strickland test, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness. . . . The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688; see also United States v. Cronic, 466 U.S. 648, 657-58, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). The "prejudice" prong of the test requires a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and that there is a reasonable probability that "but for" the claimed errors of counsel, the trial result would have been different. Strickland, 466 U.S. at 687, 694.

In this case, Mr. Bohan argues that he was denied the effective assistance of trial counsel in three respects: (1) defense counsel's failure to file alibi notices for any of the proposed alibi witnesses; (2) his failure to advise the petitioner of his right to be present during the taking of the testimony of Carmen Rodriguez; and (3) counsel's "overall inept performance throughout the trial." (Pet. Memo. at 48). Because the petitioner's claim of ineffectiveness for failure to give notice of a proposed alibi witness is intertwined with his substantive claim that he was denied the right to present a defense, these two issues will be discussed together below. The other alleged instances of ineffective assistance did not cause sufficient prejudice to the petitioner to warrant habeas relief.

Mr. Bohan testified and filed an affidavit stating that counsel never informed him of his right to be present during the examination of Carmen Rodriguez, and that he never waived this right. (First Fed. Tr. 33-34; Affidavit of Robert Bohan dated Nov. 10, 2000, attached to Reply Memorandum of Law in Support of the Petition for a Writ of Habeas Corpus). Although this evidence, if credited, might indicate deficient performance by counsel, the petitioner has not demonstrated that his presence in the examination room would have altered the proceeding in any way. Therefore, he has not established that the alleged error gave rise to any prejudice. See Strickland, 466 U.S. at 694.

The petitioner also recites several examples of the overall lack of skill of defense counsel, including his failure (1) to object to portions of the prosecution's opening statement; (2) to give an opening statement; (3) to turn over Mr. Rodriguez's statement to the prosecution as required by People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (1961); (4) to cross-examine Officer Vasquez about potentially exculpatory evidence; (5) to impeach Jamal Williams; (6) to call Manny Martinez as a witness; (7) to object to the prosecutor's improper summation; and (8) to request a limiting charge regarding erroneously admitted testimony. (Pet. Memo. at 48-51). The petitioner has again not established that "but for" these failings the outcome of the trial would have been different. Strickland, 466 U.S. at 694.

F. Preclusion of an Alibi Witness

The petitioner claims the trial court's preclusion of the testimony of Bernardo Rodriguez deprived him of his right to

compulsory process and his right to present a defense, notwithstanding the fact that the petitioner's trial counsel failed to serve an alibi notice for this witness.[24] By contrast to the claims discussed above, this one has merit.

1. Merits

Under the Compulsory Process Clause of the Sixth Amendment, defendants have the right to present witnesses at trial. U.S. Const. Amend. VI (criminal defendants have "the right . . . to have compulsory process for obtaining witnesses in his favor"); see also Michigan v. Lucas, 500 U.S. 145, 149, 114 L. Ed. 2d 205, 111 S. Ct. 1743 (1991); Taylor v. Illinois, 484 U.S. 400, 407-09, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988). This right is not boundless; courts may limit the presentation of evidence in many ways, including the preclusion of testimony if the party seeking its admission has not complied with the pertinent discovery rules, such as an alibi notice statute. Taylor, 484 U.S. at 411 (preclusion of exculpatory testimony because of defendant's failure to comply with alibi notice statute does not violate Sixth Amendment); see also Lucas, 500 U.S. at 152-53 (preclusion of evidence of defendant's own past sexual conduct with victim because of defendant's failure to comply with notice-and-hearing requirements of rape-shield statute not per se violation of Sixth Amendment). Indeed, in Taylor, the Supreme Court found it "entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony" where the failure to comply with an alibi notice statute was "willful and motivated by a desire to

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[24] The respondent concedes that this claim is not procedurally barred. (Resp. Memo. at 14).

obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence." 484 U.S. at 415.

In determining "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor," the court must balance "the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." Id. at 414-15 (footnote omitted); see also Noble v. Kelly, 246 F.3d 93, 99 (2d Cir.), cert. denied, __ U.S. __, 122 S. Ct. 197, 151 L. Ed. 2d 139 (2001).

The Second Circuit's recent decision in Noble is particularly instructive because its fact pattern is similar to that presented in this case. In Noble, the petitioner was found guilty of a murder that occurred outside a bar. At trial, the defense offered a witness who would testify that he was inside the bar with the petitioner at the time of the murder. The prosecution objected to the witness because no alibi notice had been given. Defense counsel countered that the witness was not an alibi witness because the complaint specified the crime scene as the vicinity of the bar, and the witness would place the petitioner in the bar, which was at the scene of the crime. The trial court found that the crime scene was only in front of the bar, and excluded the witness based on defense counsel's failure to give notice under the statute. Id. at 96. On appeal, the Appellate Division found that even if the judge committed error by precluding the witness it was "harmless in view of the overwhelming evidence of guilt." People v. Noble, 209 A.D.2d 735, 735-36, 618 N.Y.S.2d 123, 124 (3d Dep't 1994).

On habeas review, the Second Circuit focused on the potential prejudice to the prosecution and the willfulness of the defense attorney's actions. Noble, 246 F.3d at 99-100. It concluded that where "the state trial court could have used less onerous sanctions (such as an adjournment) to minimize any prejudice to the prosecution, . . . a finding of willfulness was therefore required to justify the exclusion of [the precluded witness'] testimony." Id. at 100. Because the state court had failed to make such a finding, the Second Circuit found that it had violated the petitioner's Sixth Amendment rights. Id.

In this case, no evidence was presented either at trial or at the hearing held in this Court from which it could be inferred that Mr. Rawlins' failure to give notice to the prosecution of Bernardo Rodriguez was willful or motivated by a desire to gain a tactical advantage. Although Mr. Rawlins certainly did not demonstrate good cause for the failure to give timely notice, cf. Anderson v. Groose, 106 F.3d 242, 246 (8th Cir. 1997) (not willful where no evidence that defense counsel knew name of alibi witness before morning of trial), the inability to provide a good excuse does not mean that defense counsel acted willfully. See Noble, 246 F.3d at 99-100; Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988).

The petitioner, citing to Noble, 246 F.3d 93, claims that Mr. Rawlins' failure to comply with the statute was due to a misinterpretation of the law and, therefore, was not willful. (Post-Hearing Memorandum of Law in Support of Petition for Writ of Habeas Corpus at 2-3). After the trial judge indicated that she was going to exclude Mr. Rodriguez from testifying, Mr. Rawlins changed tactics and argued that his failure to comply with the alibi

notice statute was due to his misreading of the law and his mistaken belief that Mr. Rodriguez was not an alibi witness because the time of the murder had not been established and Mr. Rodriguez's statement made no mention of the petitioner's whereabouts at the time of the crime. (Tr. 309). This post hoc argument is unconvincing. The record amply supports the conclusion that Mr. Rawlins' failure to come forward earlier with Mr. Rodriguez as an alibi witness was due to a combination of his last minute trial preparation, forgetfulness, and ineptitude, not to any misinterpretation of the law.

Indeed, Mr. Rawlins suggested that he simply forgot about Mr. Rodriguez after they met in March 1994, until the third day of trial when the prosecution concluded its case and the defense began its presentation. That morning, Mr. Rawlins apparently received a phone call from another alibi witness, which caused him to review his file and discover Mr. Rodriguez's statement. (Tr. 297, 345). Mr. Rawlins reiterated this rendition of the events at the hearing held before this Court. (Second Fed. Tr. 4, 11).[25]

The respondent argues that Mr. Rawlins was aware of Mr. Rodriguez and intended to call him as a witness by July 5, 1995, seven days before the prosecution rested, and yet still failed to

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[25] In attempting to discredit Mr. Rawlins' protestations of forgetfulness, the respondent misreads the record. (Resp. Post-Hearing Memo. at 14). The respondent claims that Mr. Rawlins stated that he had forgotten about all of the alibi witnesses until he discovered Mr. Rodriguez's statement in his file. This is simply unsupported by the record. As noted previously, Mr. Rawlins informed the court before jury selection began that he would be putting on alibi witnesses. Mr. Rawlins only claimed that he had forgotten about Mr. Rodriguez until the day before the Dawson hearing.

submit an alibi notice. The respondent relies on Mr. Silberg's testimony from the hearing held in federal court, in which he said that shortly before jury selection began, Mr. Rawlins told him that he wanted to call some alibi witnesses and that not all of them had testified before the grand jury. Mr. Silberg expressed his displeasure with Mr. Rawlins' failure to comply with the notice statute, and informed Mr. Rawlins he was not concerned about the witnesses with whom he was familiar, but that they would have to discuss the matter with the judge on the record. Mr. Silberg did not recall whether Mr. Rawlins specifically mentioned Mr. Rodriguez's name. (First Fed. Tr. 40-41). The only indication of this conversation in the state record from July 5 is the following:

THE COURT:	The Defendant testified and served alibi notice?
MR. SILBERG:	Correct.
THE COURT:	Is there going to be an alibi again?
MR. RAWLINS:	He agreed to accept a late notice.

(Voir Dire Tr. at 4).[26] Despite this colloquy, Mr. Rawlins never did serve alibi notice for any of the alibi witnesses. Even if Mr. Rawlins had intended to call Mr. Rodriguez by July 5, his failure to do so does not appear to be motivated by any strategic concerns, but was more likely due to his general incompetence.

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[26] "Voir Dire Tr." refers to the transcript from the voir dire proceeding.

Moreover, whether Mr. Rawlins became re-acquainted with Mr. Rodriguez immediately before the trial or five days later, as Mr. Rawlins stated at the Dawson hearing, is of little importance to this analysis because the state court never made any finding of willfulness nor inquired into whether defense counsel's "failure to comply with the notice requirement was designed to frustrate the truth-seeking function of the trial." Noble v. Kelly, 89 F. Supp. 2d 443, 457 (S.D.N.Y. 2000), aff'd, 246 F.3d 93 (2d Cir.), cert. denied, __ U.S. __, 122 S. Ct. 197, 151 L. Ed. 2d 139 (2001). After the prosecution objected to Mr. Rodriguez testifying, the state court precluded the witness, finding that it was "a clear violation of the statute." (Tr. 308). The court did not make any specific determination about Mr. Rawlins' motivation in not coming forward sooner with information about Mr. Rodriguez. Again, on appeal, the state court did not probe this issue and merely found that the trial court properly exercised its discretion in precluding Mr. Rodriguez from testifying, since defense counsel failed to comply with the statute and the prosecution was not given an opportunity to investigate Mr. Rodriguez. Where the state court has not made any finding as to willfulness, as is the case here, the petitioner is denied his right to present a defense. See Noble, 246 F.3d at 100.

Nevertheless, the respondent asserts that in Noble the Second Circuit left open the question of whether a finding of willfulness is necessary for a Sixth Amendment violation. (Resp. Post-Hearing Memo. at 15). The respondent goes on to argue that the court should consider the cumulative nature of Mr. Rodriguez's testimony, his bias, and his lack of credibility in determining whether the petitioner's Sixth Amendment rights were violated, and that all of these factors demonstrate that there was no

constitutional infirmity at trial. (Resp. Post-Hearing Memo. at 17-22). These factors, however, are more properly addressed in the harmless error analysis. More importantly, the respondent misconstrues Noble. There the court stated,

We . . . need not decide whether, and to what extent, a finding of willfulness is required in every case. . . . For purposes of the present case, we need only conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony must be supported by a finding of some degree of willfulness in defense counsel's violation of the applicable discovery rules.

Noble, 246 F.3d at 100 n.3. Here, the same circumstances are present: the trial court could have minimized any prejudice to the prosecution with a short adjournment,[27] and therefore some finding of willfulness was necessary. The respondent counters that unlike the excluded witness in Noble, Mr. Rodriguez was completely unknown to the prosecution prior to the Dawson hearing. (Resp. Post-Hearing Memo. at 16). But, "the prosecution in this case had a wealth of evidence about the place where the defendant claimed to have been and about the other witnesses who might contradict [Mr. Rodriguez's] testimony." Noble, 89 F. Supp. 2d at 457. Furthermore, Mr. Rodriguez was proffered as a witness "after the close of the prosecution's case [and so] no prosecution witnesses would have been inconvenienced by a brief delay." Id.

[27] In precluding Mr. Rodriguez, the trial judge halted the proffers made by counsel about Mr. Rodriguez's fitness to testify. (Tr. 361). Neither the judge nor either party suggested adjourning the trial to provide the prosecutor with the opportunity to interview and further investigate Mr. Rodriguez.

Accordingly, the trial court's exclusion of the alibi evidence violated the petitioner's rights under the Compulsory Process Clause: Mr. Rawlins' oversight is more consistent with incompetent advocacy -- as the trial court hinted (Tr. 305-06) -- than with intentional manipulation, the state court failed to make any finding to the contrary, and any prejudice to the prosecution could easily have been avoided. Compare Escalera, 852 F.2d at 48 (inability to provide "good excuse" for failure to list alibi witness did not show that conduct was "willful" or motivated by desire to obtain tactical advantage), Noble, 89 F. Supp. 2d at 457 (witness improperly excluded where "failure to file the notice appears to have been motivated by a genuine, albeit apparently erroneous, belief that [the witness'] testimony was not an alibi"; and no showing that defense counsel's position taken in bad faith), and Poo v. Hood, 1992 U.S. Dist. LEXIS 1535, No. 89 Civ. 7874, 1992 WL 30617, at *4 (S.D.N.Y. Feb. 12, 1992) (witness improperly excluded where no finding of willfulness), with Eckert v. Tansy, 936 F.2d 444, 446-47 (9th Cir. 1991) (witness properly excluded where defendant did not want notice given until he had contacted the witness), and Chappee v. Vose, 843 F.2d 25, 30 (1st Cir. 1988) (witness properly excluded where lawyer's explanation for failure to comply with statute was disingenuous and "counsel [was] armed to the teeth for the cross-examination, [and] lawyer had prepared a legal memorandum for submission to the judge dealing with their expected testimony"). But see Byrd v. Walker, 2000 U.S. Dist. LEXIS 6239, No. 98 Civ. 55, 2000 WL 565193, at *4 (S.D.N.Y. May 9, 2000) (although no finding of willfulness, testimony properly excluded where defense represented that there would be no alibi defense before trial but shortly before jury selection defense raised the "possibility" of calling alibi witnesses and

defense given opportunity at trial to challenge order of preclusion of alibi witnesses but never pursued it).

2. Standard of Review for Granting Habeas Relief

With the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), federal courts may not grant a writ of habeas corpus unless the state court's decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1); see also Noble, 246 F.3d at 98. However, this deference is only required where the state court "adjudicated [the claim] on the merits," 28 U.S.C. § 2254(d); otherwise the pre-AEDPA, de novo standard of review applies. Noble, 246 F.3d at 98. Although in this case the Appellate Division never explicitly referred to the Compulsory Process Clause of the Sixth Amendment or to federal caselaw, there is no suggestion that it rejected the petitioner's claim on non-substantive grounds. Accordingly, it appears to have been adjudicated on the merits. See Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001). That issue need not be definitively determined, however, since the result is the same whether the pre-AEDPA or post-AEDPA standard is used. See Washington v. Schriver, 255 F.3d 45, 48 (2d Cir. 2001); Noble, 246 F.3d at 98.

The Supreme Court recently differentiated between § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. Williams v. Taylor, 529 U.S. 362, 405-08, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). It found that a state court decision is "contrary to" federal constitutional law if the court either "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "confronts facts that are materially

indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [it]." Id. at 405. The "contrary to" clause does not, however, encompass state court decisions where the court applies the correct legal rule, no matter how erroneous or unreasonable the application. Id. at 406-07. In contrast, a state court decision involves an "unreasonable application" of Supreme Court precedent if the state court "identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or if the state court either "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407.

In this case, the state court did not employ the correct legal principle; therefore, the "contrary to" portion of § 2254(d)(1) applies. By not considering "whether defense counsel had wilfully or in bad faith failed to comply with the alibi notice requirement," Noble, 89 F. Supp. 2d at 461, the Appellate Division did not follow Supreme Court precedent as established in Taylor, 484 U.S. at 415. The state court merely denied the claim based on its discretion under the state alibi notice statute and the inability of the prosecution to conduct a complete investigation of Mr. Rodriguez. Bohan, 257 A.D.2d at 443, 684 N.Y.S.2d at 514. "The court's error, therefore, does not lie in its application of the Taylor standard to the particular facts of this case; it lies in the fact that the court applied the wrong standard." Noble, 89 F. Supp. 2d at 461. Indeed, the state court both "arrived at a conclusion opposite to that reached by [the Supreme Court] on a question of law" and "confronted facts that were materially indistinguishable from a

relevant Supreme Court precedent and arrived at a result opposite to [it]." Williams, 529 U.S. at 405.

Even if the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1) were controlling,[28] it would not alter the result. There is simply no basis for concluding that Mr. Rawlins' failure to file an alibi notice for Mr. Rodriguez was willful or motivated by any tactical concerns. Therefore, the Appellate Division's denial of the claim was an "unreasonable application" of established federal law.

3. Harmless Error

Despite this constitutional infirmity, habeas relief is only available if the error is not harmless. See Brecht, 507 U.S. at 623; Noble, 89 F. Supp. 2d at 457, 458 n.15 (exclusion of testimony based on failure to comply with alibi notice statute is trial error subject to harmless error review). The standard for harmlessness is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623 (quotations and citations omitted).[29] If the court is in "grave

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[28] The state court's discussion of the preclusion of Mr. Rodriguez could be interpreted as only addressing the state law issue -- violation of the alibi notice statute -- and the summary denial of all remaining claims at the end of the Appellate Division's decision as encompassing the petitioner's constitutional claim. See Bohan, 257 A.D.2d at 444, 684 N.Y.S.2d at 515 ("We have reviewed and rejected defendant's remaining contentions."). When a claim is summarily denied by the state court, the "unreasonable application" clause applies. See Sellan, 261 F.3d at 314-15, n.6.

[29] In finding a constitutional error not harmless on direct review, a state appellate court must determine that it was harmless beyond a reasonable doubt in accordance with Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705,

doubt" whether an error is harmless, the writ of habeas corpus must issue. O'Neal v. McAninch, 513 U.S. 432, 435, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995). Moreover, "grave doubt" exists where "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error." Id., 513 U.S. at 435.

With regard to constitutional violations of the right to present witnesses, the Second Circuit recently restated the test:

> Whether the exclusion of [witnesses'] testimony violated [the defendant's] right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist. In a close case, additional evidence of relatively minor importance might be sufficient to create a

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87 S. Ct. 824 (1967). See Noble, 246 F.3d at 101 n.5. In contrast, federal courts have employed the standard set forth in Brecht to make such determinations on habeas review. However, the Second Circuit in Noble recently questioned the continued validity of Brecht: "After AEDPA, the question arises whether a federal habeas court should continue to apply Brecht or determine instead whether the state court's decision was 'contrary to, or involved an unreasonable application' of Chapman. 28 U.S.C. § 2254(d)(1)." 246 F.3d at 101 n.5.

Nevertheless, the more stringent AEDPA standard only applies where the state appellate court has "adjudicated [the claim] on the merits." Noble, 246 F.3d at 98; Washington, 255 F.3d at 55 (2d Cir. 2001). In this case, it is unnecessary to resolve the issue presented in Noble, namely whether to apply the Brecht standard or the AEDPA standard, because the state court did not adjudicate the harmlessness issue on the merits. The Appellate Division did not find a constitutional violation and, as a consequence, never addressed whether any error was harmless

> reasonable doubt. On habeas review, trial errors are subject to lenient harmless error review. The creation of otherwise non-existent reasonable doubt satisfies the substantial and injurious standard.

Washington, 255 F.3d at 56-57 (quoting Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000) (internal quotations omitted)).

In this case, two witnesses testified that they were with Mr. Bohan at his home when the murder took place, which was minutes before 10:25 p.m. (Tr. 309). Roberto Cruz first testified that he last saw Mr. Bohan a little after 10:00 p.m. when he went to say goodnight to Mr. Bohan's grandmother. (Tr. 263). Mr. Cruz stayed with her until approximately 10:05 or 10:10 p.m. and then left the apartment with several of his friends at around 10:15 p.m. (Tr. 262-64). Later, on cross-examination he admitted that he was not sure when he left but that it was before 10:30 p.m. because when he arrived home, across the street, the news was still on the television. Julia Feci, the petitioner's grandmother, presented testimony consistent with that of Mr. Cruz: she said Mr. Cruz left the apartment either at 10:15 or 10:30 p.m. (Tr. 232-33, 243-44), and Mr. Bohan came into her bedroom to watch television sometime afterwards. On direct examination she claimed Mr. Bohan joined her at 10:30 p.m. and stayed until the end of the program at 11:00 p.m. (Tr. 233-34), but on cross-examination changed her testimony and said he came in at 10:45 p.m. and remained until 11:00 p.m. (Tr. 244-45, 247). She also admitted on cross-examination that she did not look at a clock during the night in question, but could tell time by the commercial breaks in the one-hour television program she regularly watched. (Tr. 244-46). In his summation, the prosecutor argued that the testimony from

the two alibi witnesses was not inconsistent with the prosecution's theory of the case, because neither could account for the petitioner's whereabouts from a little after 10:00 to 10:45 p.m.; thus giving him enough time to commit the murder:

> The most important thing about Ms. [Feci] in the context of defendant's case, I refer to her, and you should keep in mind the one thing about her is she was too late, what I mean is she can say she saw defendant until 10:45 . . . . She says 10:45, the murder occurred four or five blocks away at 10:25, so there is enough time to commit the murder and get back.
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> She can say she saw him [at] 10:30, 10:25, 10:15, times that would mean more to you because it will tell you he could not have done it if she saw him at that time. She does not see him until 10:45. Too late.
>
> You heard from Roberto Cruz, too early. He said he's playing video games and leaves defendant around 10:00 to go into the grandmother's room, does not see him after that, talks to the grandmother and goes home. So Cruz is too early. Certainly the defendant could have left at ten o'clock and gone down to 167 Street.
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> When you put the two witnesses together and Mr. Cruz also was never sure of time until he gets home [at] 10:30. Put the two witnesses together, what you get is too early and too late.

(Tr. 517-18).

Mr. Rodriguez's testimony places the petitioner at home during the time period unaccounted for by other witnesses, thus providing critical support to Mr. Bohan's alibi and undermining the prosecution's argument. During the Dawson hearing and again in the hearing held in federal court, Mr. Rodriguez stated that he stopped by 171st Street at 10:05-10:10 p.m. after he finished work. (Tr. 283-84; First Fed. Tr. 70). He found Mr. Cruz and several other friends outside Mr. Bohan's apartment building. They relayed to him what had happened earlier, at which point Mr. Rodriguez looked up and saw Mr. Bohan and his grandmother through the second-floor window at approximately 10:10-10:15 p.m. (Tr. 285; First Fed. Tr. 72-73, 91). He also confirmed that Mr. Cruz departed for home soon after Mr. Rodriguez arrived on the block. (Tr. 285; First Fed. Tr. 95). Mr. Rodriguez remained outside Mr. Bohan's building until 11:10-11:15 p.m. (Tr. 284; First Fed. Tr. 74).

Mr. Rodriguez's testimony would have rehabilitated Ms. Feci's story as to when Mr. Bohan came into her room and began watching television with her, specifically that he came in at 10:15 p.m., not at 10:45 p.m., and stayed with her for the remainder of the television program. Even the respondent has conceded that Mr. Rodriguez's testimony, if believed, was not cumulative. (First Fed. Tr. 8).[30]

In sum, Mr. Rodriguez's testimony "bore on an issue that [was] plainly critical to the jury's decision; . . . was material to the

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[30] Although respondent's counsel made this concession during the hearing in this Court, the respondent's subsequent brief seeks to retract it. (Resp. Post-Hearing Memo. at 2)

establishment of the critical fact [and was not] instead . . . cumulative; and . . . [concerned issues] emphasized in arguments to the jury," which are all factors weighed in determining the effect of improperly admitted evidence. Wray, 202 F.3d at 526 (quotations and citations omitted). Furthermore, in at least one case in this district, a court found the error not to be harmless where, as in the instant case, there was contradictory identification testimony and inconsistent testimony from alibi witnesses, and the excluded testimony provided crucial support to the petitioner's alibi. Noble, 89 F. Supp. 2d at 458-59; cf. Poo, 1992 U.S. Dist. LEXIS 1535, 1992 WL 30617, at *5 (harmless error where complaining witness who identified petitioner knew petitioner well and had no motive to lie; excluded alibi witnesses were interested witnesses; excluded witness' statement contradicted testimony by complaining witness and police testimony would have weakened value of her testimony).

The respondent argues that Mr. Rodriguez's testimony can be viewed as either cumulative because he, like Mr. Cruz and Ms. Feci, is a friend of the petitioner's, or as unreliable, because the other statements made to the police by the petitioner's friends made no mention of Mr. Rodriguez and contradicted his chronology of the events on the night of the murder. (Resp. Post-Hearing Memo. at 17, 19-22). However, the degree to which Mr. Rodriguez's interest affects his credibility is a question for a jury, not this Court. See United States v. Doyle, 130 F.3d 523, 543 (2d Cir. 1997) ("it is the role of the jury --not the court-- to assess the credibility of witness testimony"); see also Bossett v. Walker, 41 F.3d 825, 830 (2d Cir. 1994). Similarly, the inconsistencies between Mr. Rodriguez's statements and those made by other witnesses is a matter of credibility not reliability. The prosecution

is free to call Jason, Angel, and Albert -- the petitioner's friends who claimed to have been at his apartment the night of the murder -- or to use their statements to impeach Mr. Rodriguez and call into doubt his recollection of the events of January 12, 1993. Moreover, Mr. Rodriguez is not an inherently incredible witness: he is a college graduate; he has no criminal history other than a minor infraction which was dismissed; he is now an applicant for a position as a police officer; and he has not wavered in his rendition of the critical events.

Because exclusion of Mr. Rodriguez's testimony was contrary to clearly established federal law and this error was not harmless, Mr. Bohan's petition should be granted on the ground that his conviction was obtained in violation of the Compulsory Process Clause.

4. Ineffective Assistance Relating to the Alibi Notice

Based on the same facts, Mr. Bohan argues that he was denied effective assistance of counsel when his attorney failed to provide notice of alibi witnesses. The decision to pursue a certain defense strategy and to call certain witnesses in support of that theory of the case is certainly a tactical decision, and generally not entitled to habeas relief. See Noble, 89 F. Supp. 2d at 462. In many cases courts have rejected habeas claims alleging that trial counsel failed to present alibi testimony. See id. (citing cases). In those cases the courts were faced with trial counsel's failure to pursue a particular strategy, namely an alibi defense. In this case, however, defense counsel had decided to pursue an alibi defense and was only able to put on two of the three alibi witnesses because of his failure to comply with the alibi notice statute. As discussed previously, "in

no sense, can that failure be attributed to a strategic choice." Id. at 463. Unlike defense counsel in Noble, whose failure to give alibi notice was due to a misinterpretation of the notice statute, Mr. Rawlins' failure to provide notice was caused by his sheer ineptitude. He appears to have believed that the prosecutor, out of good-will in the spirit of cooperation, would simply allow him to present alibi witnesses without notice. (Tr. 304-10). In addition, with regard to Ms. Feci and Mr. Cruz, he informed the court that he would provide alibi notices and yet, without explanation, failed to do so. (Voir Dire Tr. at 4). This behavior clearly falls "outside of the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

With regard to the second prong of the Strickland analysis, the petitioner has also met his burden. Although Mr. Bohan did not suffer any prejudice as a result of Mr. Rawlins' failure to file notice for Ms. Feci and Mr. Cruz because they both were allowed to testify, the preclusion of Mr. Rodriguez deprived the petitioner of a critical witness who would have provided testimony closing any time gap in the alibi. Finally, it is more than a "reasonable probability" that the trial result would have been different "but for" the errors of Mr. Rawlins, thus depriving the petitioner of a fair trial. Id. at 694.

As previously discussed, if the state court employed the correct legal principle, no matter how erroneously, the "unreasonable application" clause applies, while if the state court utilized an incorrect legal standard, the federal habeas court must use the

"contrary to" analysis. Williams, 529 U.S. at 406-07.[31] The state court in this case found that the "defendant received meaningful representation. Counsel's alleged errors could not have deprived defendant of a fair trial. (People v. Benevento, 91 N.Y.2d 708, 713-714, 674 N.Y.S.2d 629, 697 N.E.2d 584 [(1998)])." Bohan, 257 A.D.2d at 444, 684 N.Y.S.2d at 514. In reaching its decision the Appellate Division relied on state constitutional analysis, which is more expansive than the Strickland standard. As the New York Court of Appeals explained in Benevento,

> the [state constitutional] claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case. . . . Thus, whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel.

91 N.Y.2d at 714, 674 N.Y.S.2d at 633 (emphasis added). While the state analysis is not identical to Strickland, it cannot be said to be "diametrically different" from the federal constitutional analysis. Williams, 529 U.S. at 405-06. Rather, the state constitutional protection extends to those errors that would be federal constitutional violations under Strickland and its progeny and also to some errors that would not entitle a defendant to relief under federal law. Given that the state constitutional protection

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[31] Again, it is unnecessary to decide whether the claim was adjudicated on the merits thus triggering the AEDPA's more deferential standard, because the result is the same under either the de novo standard or the provisions of the AEDPA. See Noble, 246 F.3d at 98; Washington, 255 F.3d at 48.

encompasses the federal Constitution's guarantee of effective assistance of counsel, the state court's decision was not "contrary to" Supreme Court precedent and the "unreasonable application" clause, therefore, governs this analysis.

The state court's application of clearly established federal law in denying the petitioner's ineffective assistance claim on appeal was objectively unreasonable. See Williams, 529 U.S. at 409 ("[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."). There was no reasonable justification for its conclusion that the preclusion of Mr. Rodriguez did not result in the deprivation of a fair trial for the petitioner. See id. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). Accordingly, trial counsel's performance was constitutionally ineffective and provides a second ground for issuance of a writ of habeas corpus.

Conclusion

Because the preclusion of alibi testimony violated the Compulsory Process Clause and defense counsel's failure to comply with the alibi notice statute deprived the petitioner of effective assistance of counsel, Mr. Bohan's petition for a writ of habeas corpus should be granted. Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10)

days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Victor Marrero, Room 414, 40 Foley Square, New York, New York 10007, and to the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007.

Respectfully submitted,
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
December 28, 2001

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

The People of the State of New York,

Petitioner,

-against-

Robert Bohan,

Appellant

January 12, 1999, Decided
January 12, 1999, Entered

For Respondent: Sylvia Wertheimer.

For Defendant-Appellant: Joel A. Brenner.

JUDGES: Sullivan, J. P., Lerner, Mazzarelli and Saxe, JJ.

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered October 11, 1995, convicting defendant, after

a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

There was legally sufficient evidence of guilt and the verdict was not against the weight of the evidence. We see no reason to disturb the jury's determinations regarding the credibility and reliability of witnesses.

The trial court properly exercised its discretion in precluding defendant from calling a third alibi witness, since the defense concededly failed to give proper alibi notice pursuant to CPL 250.20 and since the People were deprived of the opportunity to conduct a proper investigation regarding any of the alibi testimony (see, People v Alvarez, 223 AD2d 401, lv denied 88 NY2d 980).

Defendant's contention that the conditional examination of an incarcerated hospitalized witness in a communicable disease unit was conducted out of defendant's "presence" is unreviewable, defendant having failed to provide a sufficient record to establish that the special seating arrangements deprived him of the right to be present (see, People v Brown, 221 AD2d 160, lv denied 87 NY2d 898). In any event, the existing record establishes that defendant waived his right to be situated in closer proximity to the witness and counsel.

On the existing record, which defendant has not sought to amplify by a motion pursuant to CPL 440.10, we conclude that defendant received meaningful representation. Counsel's alleged errors could not have deprived defendant of a fair trial (People v Benevento, 91 NY2d 708, 713-714).

We perceive no abuse of sentencing discretion and conclude that the sentence was not based on any improper criteria.

We have reviewed and rejected defendant's remaining contentions.

Supreme Court, U.S.
FILED
JAN 16 2004
OFFICE OF THE CLERK

No. 03-877

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility,

Petitioner,

- against-

ROBERT BOHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED AS A POOR PERSON

Joel A. Brenner, an attorney admitted to practice in this Court, hereby affirms the following:

I represent respondent Robert Bohan. I have accepted a reduced fee to prepare and file this opposition brief because Mr. Bohan is destitute (his affidavit of indigence is attached) and his family is paying my fee. However, neither Mr. Bohan nor his family can afford the additional cost of printing 40 copies of the opposition brief, which I have been informed would cost at least several hundred dollars.

WHEREFORE, respondent should be permitted to proceed as a poor person, and to file an originak and 10 copies of a typewritten brief.

Respectfully submitted,

JOEL A. BRENNER, Esq.
76 Tompkins Street
East Northport, New York 11731
(631) 757-9189
Counsel of Record for Respondent

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Robert Bohan, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give any security therefor, I state that because of my poverty, I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am not presently employed. I have been a prisoner of the State of New York for the last eight years. The last date I was employed was 1991
and my salary or wages per month was $ 30.00 per day.

2. In the last twelve months I have not received any income from any source.

3. I do not own any cash and I do not have a checking or savings account.

4. I do not own any real or personal property (excluding ordinary household furnishings or clothing).

5. No one is dependent upon me for their support.

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to before me this 24th
day of November, 2003

NOTARY PUBLIC

R. Bohan
ROBERT BOHAN

No. 03-877

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility,

Petitioner,

- against-

ROBERT BOHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOEL A. BRENNER ,Esq.
76 Tompkins Street
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(631) 757-9189
Counsel of Record for Respondent

January 15, 2004

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COUNTER-STATEMENT OF THE CASE[1]

Trial Court Proceedings

Prosecution Case

Alleged Motive for, and Events Preceding, the Shooting

Jamal Williams was a high school drop-out and unemployed except when he was selling crack cocaine - a drug he claimed *he* did not use - for Joseph Alvarez. He and Alvarez were "best" friends, and he admitted that he wanted *someone* to pay for his friend's death (Trial Transcript - hereafter "T". - 61-63, 100).[2]

Williams testified that, about six months prior to the shooting of Alvarez, he saw a "Mike" Bohan punch one "Junior"(another drug dealer), after which Junior shot at Mike, wounding a friend of Mike's. However, when Williams was asked to identify *Mike*, he pointed to a "Nicholas" in the audience (T. 65-6, 68-71).[3]

Williams said that he and Alvarez later met with a "Robert" at MacDonalds, and he told them to help him find Junior or he would "get both of us": on cross examination, Williams said that Mike/Nicholas, *not* Robert, was the person he and Alvarez met. Notably, when asked if Robert was respondent, Williams said he was **not** (T. 68, 71-2, 93-4).

Although Williams claimed that he had seen Robert three times a week for six months

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[1] The "Counter-Statement of Facts" is necessary to fulfil respondent's obligation to "point out in the brief in opposition ... any perceived misstatement [of fact] made in the petition". Rule 15.2.

[2] It should be noted that petitioner's recitation of the trial testimony is devoid of a single transcript references. Petition for Writ of Certiorari (hereafter "Pet.") at 4-5.

[3] This was only the first of several *mis*identifications by Williams.

between the altercation with Junior and the shooting, at the grand jury he said he had seen Robert only 3 or 4 time in his entire life and only once after the shooting (T. 94-96, 105). Williams ultimately admitted at trial that he did not know Robert "good" and that the *only* time he ever saw his face prior to the shooting was during the alleged meeting at MacDonalds (T. 106, 122).

Christopher Lopez, another crack dealer who was also Alvarez's cousin, said he saw respondent and Alvarez twice talking inside MacDonalds, but did not know what they said: Jamal Williams was *not* there (T. 165, 167-68, 170-2, 178).

Terrance Gillard, another crack dealer and friend of Alvarez, said that before the shooting respondent met him and Alvarez at MacDonalds, and Alvarez went inside and spoke with respondent alone. Notably, Gillard also did not testify that Williams was at the meeting (T.152-53).[4]

The Shooting and Subsequent Questionable Identifications

Although Williams testified the shooting took place at 10:25 p.m., Lopez testified that it occurred at 10:05 p.m. (T. 73, 173).[5]

Williams said that he was on the street when the shooting occurred: however, in the grand jury, he testified he was *inside* a building smoking a cigar-size marijuana "blunt" (T. 73, 83-84, 123).

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[4] The Magistrate and District Judges explicitly noted both the contradictory nature of Williams' testimony and the fact that other prosecution witnesses testified Williams was not present at the meetings allegedly attended by respondent. *See* Appendix to Petition for Writ of Certiorari - hereafter Pet. Appx - at 6a-7a and n.2, 45a-50a and n.4.

In sum, both Judges discredited Williams' testimony that respondent and Alvarez had meetings regarding Junior's whereabouts. That fact severely weakened the prosecutor's claim that respondent had any motive for shooting Alvarez, especially when considered in conjunction with Williams' impossibly contradictory testimony, *infra*, as to the identify of the actual shooter.

[5] As will be shown, *infra*, it is undisputed that respondent had an alibi for 10:05 P.M. Accordingly, the prosecution ignored the testimony of its own witness and asserted that the shooting took place at 10:25 P.M.

Furthermore, while, according to Williams, only one shot was fired (T. 74-76), it was stipulated that Alvarez was shot twice (T. 226), and another prosecution witness (Lopez), testified that a total of three shots were fired (T. 173). Williams also said it took the shooter *twenty minutes* to walk 1/2 block at a normal pace (T. 108-09).[6]

Although at trial Williams said the shooter wore a black and white jacket, and black pants, in other statements he said that the shooter wore blue jeans and a striped shirt (T. 78-9, 86, 124).[7] Of particular importance - and contradicting every other witness to the crime - Williams said the shooter was *not* wearing a "hoody", *i.e.*, a hooded sweatshirt (T. 89).

Williams said that the shooter had a silver gun with a black handle, but in a prior statement he said he did not see the gun at all (T. 98, 100-01).

Although Williams first *named* one "Robert" as the person who shot Alvarez, when asked to *identify* that person, he pointed to respondent's brother. Then, when asked if the "Robert" who shot Alvarez was in the courtroom, Williams said he was *not*. Finally, he identified the shooter as "Mike" (T. 68-8, 93).[8] Williams said he attended a lineup the following day and he picked out respondent as the shooter: then, and contrary to his previous testimony that the shooter was **not** in the courtroom,

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[6] No doubt, Williams's perceptions were effected by the marijuana he was smoking at the time. In any event, even the prosecutor conceded this testimony was "wrong" (T. 511).

[7] It was stipulated that Bohan's brother Nicholas was the person in the "striped shirt"(T. 156).

[8] In his opening statement, the prosecutor had told the jury that Jamal Williams was the "heart" of the prosecution case (T. 38-39). However, based on the foregoing contradictions and inconsistencies, the prosecutor was later forced to concede that Williams "obviously identified the brother ... [and] failed to" identify respondent (T. 68).

he identified respondent as the person who shot Alvarez (T. 68, 77).[9]

Finally, Williams admitted that he was testifying against respondent to "help out" Alvarez's grieving mother (T. 111).

Other prosecution witnesses completely contradicted Williams' testimony.[10]

Shawn Criss was on the street standing 6-7 feet from Alvarez when he saw a "Spanish looking" person approach wearing a "*hoody* [and] hat": it was "dark" at the time, and the shooter's entire face and head were covered (T. 143, 147). The shooter was *not* in the courtroom, *i.e.*, was *not* respondent (T. 142).

Michael Jenkins had been arrested for selling crack cocaine, the prosecution offered him no jail time if he testified against respondent, and, accordingly, he said he saw respondent shoot Alvarez. However, on cross-examination, he was forced to admit that, he had never seen respondent before, that he could "[n]ot clearly" see the shooter's face, and that in testimony before the grand jury he said that he could *not* identify the shooter because the shooter's head was "completely covered" by a "hoody" (T. 184, 193, 195-99).[11]

In addition, Jenkins said that the shooter had black hair and Williams testified the shooter had

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[9] In view of the inconsistencies and contradictions throughout Williams' testimony, it is not surprising that both the Magistrate and District Judge gave scant notice, and even less credence, to Williams' belated and altogether unsatisfactory in-court "identification" of respondent. *See* Pet. Appx at 7a, 46a.

[10] Although both the Magistrate and District Judge noted these inconsistencies and contradictions (Pet. Appx at 6a-8a, 54a-50a), petitioner's recitation of the trial testimony completely ignores them (Pet. at 4-5).

[11] No doubt that was why the prosecutor specifically told the jury in his opening that the *only* eyewitness who would identify respondent as the perpetrator was Williams (T. 38-39).

blond hair (T. 78-79, 198), whereas respondent has brown hair (PSR at 1).

The Defense Case

Evidence Exculpating Respondent, and Incriminating Another, as the Killer

Carmen Rodriguez knew both Alvarez and respondent. She was standing about two feet from Alvarez when he was shot: although she could not see the shooter's face clearly - because he had a hood on - she knew it was *not* respondent because the shooter was a "short guy" (about 5'3" tall) and had "dark skin"(T. 316-8, 331).[12]

She spoke with the police and the trial prosecutor twice about the incident, and both times they tried to confuse her in an attempt to get her to change her story (T. 325-26).[13]

Jose Rivera also knew respondent. On the night of the crime, he heard gunshots and a "Puerto Rican kid with black hair with a hoody ... flew around the corner". Notably, Rivera said the person was *not* respondent (T. 364-65, 403, 415).

Julia Feci, respondent's grandmother, testified that he lived with her at the time of the crime (T. 228-30). She vividly remembered the date of the shooting, for the following reasons:

Respondent had been out earlier that day, but had arrived home at about 8 to 8:15 p.m. and,

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[12] Respondent is 5'-11" and white (Pre-Sentence Report at 1).

[13] On rebuttal, a detective testified that Rodriguez made the following statement: "Robert said to Joey [']give me my money, motherfucker['] and Joey said [']I don't [owe you] no money[']; so Joey turned around and ... that is when Robert shot him" (T. 434-35).

Since it was the prosecutor's position that respondent shot Alvarez for failing to reveal Junior's whereabout, this alleged statement - that respondent shot Alvarez over some previously unknown debt - is simply incredible (and supports Rodriguez's testimony that she never made it).

Another explanation for the foregoing is that the shooter did make the statement Rodriguez said he made but that the shooter was someone else - such as a rival drug dealer to whom Alvarez owed money - not respondent.

from then on until 11 p.m., he was in his room with his friends watching television. At one point she had served them coffee in that room. One of the boys (Roberto Cruz, known as "Pidge") came to her room after 10:15 to say good night: she knew the time because he came in during a commercial break in her favorite TV program. Cruz spoke with her a while, and he then left the apartment at 10:30: she knew that time because she had looked at the clock in her room when he left. She then went into respondent's room where she found that the boys had broken a coffee table and twin beds she had recently purchased: she told the boys to leave, went into her bedroom, and sat by the window. Respondent followed her, apologized, and sat with her until 11 p.m. (T. 229-34, 238-40).

Roberto Cruz was a security guard. On the night of the crime he and some of his friends went to respondent's apartment "a bit after eight o'clock": respondent and his grandmother were there. They watched a children's TV show with one of respondent's younger sisters until after 9:00 p.m. Shortly after 10:00 p.m. that evening, some furniture broke while they were wrestling on it: when respondent's grandmother saw the broken bed, she told the boys to leave, and went back into her room. Cruz said good night to her, and went home: he knew that it was 10:15 p.m. when he left the apartment because he looked at his watch (T. 252-4, 261-65, 269).

He never saw respondent wear a "hoody" (T. 270).

Exclusion of Bernardo Rodriguez's Testimony

Prior to the testimony of Feci and Cruz, there was a discussion regarding whether the prosecutor would allow defense counsel to call alibi witnesses as to whom he had not given alibi notice. When Bernardo Rodriguez's name was first mentioned, the prosecutor voiced no objection to Rodriguez testifying: however, the trial judge, *sua sponte*, ordered a hearing regarding whether Rodriguez could be cross-examined on his alleged "failure" to come forward prior to the trial (T.

223).[14]

At the hearing, **Bernardo Rodriguez** testified that on January 12, 1993, shortly after 10:00 p.m., he stopped to talk with several of his friends, including Roberto Cruz, standing in front of the apartment building where respondent and his family lived: the boys were laughing that respondent's grandmother had just thrown them out of her apartment. While they were talking, Rodriguez looked up at respondent's apartment and saw respondent, looking upset, and his grandmother at the window. A few minutes later, Cruz left, but Rodriguez remained (T. 281-85).[15]

When the court suggested that Rodriguez's testimony could be excluded because of the failure to give notice, defense counsel argued that the prosecutor had allowed other unnoticed witnesses like Mrs. Feci and Cruz to testify, to which the court responded:

> They're bending over backwards so this won't later become *ineffective assistance of counsel* on appeal.... I did more than I'm required to do so this will not be overturned on an issue like that (T. 305-6).

When the court asked the prosecutor if he would consent to Rodriguez testifying, *for the first time* the prosecutor weakly asserted that he would "rather" Rodriguez not testify, and the court precluded him because defense counsel had "not given ... good cause" why Rodriguez was not named

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[14] The fact that the trial judge knew there was an issue as to Rodriguez's alleged failure to come forward shows that the parties had discussed Rodriguez's potential alibi testimony *previously*, and that the prosecutor had *prior* notice thereof. At the evidentiary hearing held before the Magistrate that fact was established. *See* Appendix to Respondent's Appeal to Second Circuit, Exh. G at 40 (prosecutor conceded that he had known of Rodriguez since "we were about to begin jury selection", *i.e.*, a week *prior* to Rodriguez's appearance in court).

[15] This testimony would have specifically corroborated the testimony of respondent's grandmother both that Cruz had been asked to leave the apartment and that she and respondent sat at her bedroom window after he apologized to her.

as an alibi witness (T. 307-8).

Defense counsel asked "What is the prejudice?", to which the court responded "This case is two and a half years old" (T. 310). The prosecutor later asserted that he had been prejudiced because "Had I known his name earlier I could have investigated him". However, he also conceded that he *had* conducted an investigation of Rodriguez since he had learned of his identity and found that he had no criminal record: defense counsel asserted that because the prosecutor "found [Rodriguez] was clean ... [he] rejected him", *i.e.,* because he had no basis to impeach him on cross-examination (T. 344-8, 354-60).

Despite the foregoing, the court adhered to its prior ruling excluding Rodriguez (T. 360-1).

Prosecutor's Summation

The prosecutor told the jury that even if they believed the alibi testimony of Feci and Cruz, they could still convict respondent because he had time to leave the apartment, commit the crime and return, *i.e.,* the testimony of Cruz was "too early" while that of Feci was "too late" (T. 517-8).

Deliberations And Verdict

After lengthy deliberations, during which the jury reheard the testimony of several witnesses, respondent was found guilty of second degree murder (T. 568-72).

The State Appellate Proceedings

The Appellate Division, First Department upheld respondent's conviction, holding that the preclusion of Rodriguez's testimony was proper, and that defense counsel's failure to file an alibi notice was neither incompetence of counsel nor deprived respondent of a fair trial. *People v. Bohan,* 257 A.D.2d 443, 684 N.Y.S.2d 514 (1st Dept), *lv den.,* 93 N.Y.2d 871, 689 N.Y.S.2d 433 (1999).

Federal Court Proceedings

Respondent filed a petition for a writ of *habeas corpus* arguing, *inter alia*, that the preclusion of Rodriguez's alibi testimony deprived him of his right to present his defense, and that defense counsel had been incompetent for not filing an alibi notice. The Magistrate Judge to whom the petition was referred held an evidentiary hearing on those claims.[16]

Robert Bohan testified that when Earl Rawlins became his defense counsel he told him of his alibi witnesses, including Bernardo Rodriguez, and he asked Rawlins to call Rodriguez. After he was convicted, Rawlins told him to appeal and said that "my best issue was my alibi ... because he fucked [it] up". Exhibit G to Respondent's Appendix on Appeal to Second Circuit - hereafter "Exh. G." - at 12-14, 20.

Stewart Silberg, the trial prosecutor, testified that based upon the grand jury testimony of respondent and others, there was an alibi defense. Exh. G at 39-40.

Silberg first became aware of Bernardo Rodriguez's name as jury selection was beginning.[17] Rodriguez's "rap sheet" showed that he had no criminal record: in addition, Silberg conceded that there were 7-10 "real" days between the time he learned of Rodriguez's identity and the end of the People's case (when Rodriguez was offered as a witness), that during that time he had spoken to both a criminal investigator and one of the case detectives who turned up no incriminating evidence against Rodriguez, that he had read the statement Rodriguez had given to defense counsel, and that he neither asked defense counsel if he could interview Rodriguez nor asked for the "three-day adjournment" to

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[16] Petitioner's brief, and self-serving, summary of that hearing is, once again, unaccompanied by any transcript references. Pet. at 7.

[17] Jury selection began on July 5, 1995 and the discussion of the preclusion of Rodriguez's testimony took place a full week later, on July 12 (T. 220).

investigate Rodriguez further. Exh. G at 40-49, 59-61, 66.[18]

Silberg conceded that Rodriguez was the only one of the unnoticed alibi witnesses to whose testimony he would not consent. Exh. G at 49.

When defense counsel began questioning Silberg regarding his summation - where Silberg had told the jury that the alibi testimony of Mrs. Feci was "too early" and that of Cruz was "too late" (T. 517-8) - the Magistrate Judge said "I understand the point about the *emphasis* that Mr. Silberg put on the *gap*". Exh. G at 54-5.

Bernardo Rodriguez was 27 years old, a college graduate, employed as a public school teacher, had never been arrested, and was on the "waiting list" to be a police officer. Exh. G at 67-8, 74.

On January 12, 1993 he was helping his father operate a "hotdog stand" at City College. When it closed at 9 p.m. he walked to the subway, caught the same train he always did at 9:20, and took it to 168 Street: he looked at his watch when he stopped in a store between 170-171 Street for a snack, and it was 9:55 p.m.. When he got to the corner of 171 Street he saw some of his friends and he joined them. They were in front of respondent's apartment house, and each was telling his version of how "Granny" had thrown them out of her apartment for breaking her furniture: when he looked up at the window they were pointing at, he saw respondent and his grandmother at the window. He stayed in front of the apartment house until 11:15 p.m., when he went home. Exh. G at 68-74, 81-92, 95-6, 102.

Earl Rawlins was respondent's trial attorney. Exhibit H to Respondent's Appendix on

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[18] Pursuant to the mandatory requirements of N.Y.C.P.L §250.20 (3)(Pet. at 4), had Silberg made such a request, the judge would have had to grant it.

Appeal to Second Circuit - hereafter "Exh. H." - at 3. He did not file any alibi notice because he had forgotten that Bernardo Rodriguez's statement was in his file. When he found the statement the trial was about to begin, so he simply told the prosecutor he wanted Rodriguez to testify as an alibi witness. Exh. H at 4, 11.

He specifically testified that his failure to file an alibi notice was "*not* ... to sandbag or get an unfair advantage on the prosecutor":

> Q. Now, when you became aware of Bernardo Rodriguez, were you a little wary about letting us have information about him, because you were afraid that it wouldn't work out well if we had an opportunity to speak to Mr. Rodriguez?
> A. No, it's the contrary. As I reviewed the letter ... I would be more than happy to give you that letter so you could check it out ...
> Q. It wasn't a concern of yours that upon investigation of Mr. Rodriguez that in effect, he might be nullified at trial?
> A. No (Exh. H at 4, 7).

Rawlins also corroborated respondent's testimony that, after sentencing, Rawlins admitted to respondent that he had "made a mistake in handling [the] alibi [testimony]" and "that would be an appealable issue". Exh. H at 10.

Magistrate's Report And Recommendation[19]

The Magistrate issued a 75-page Report and Recommendation that the writ be granted.

First of all, the trial evidence was analyzed in great detail, with particular emphasis on the numerous inconsistencies and contradictions in the testimony of the prosecution witnesses on crucial points of evidence. Next, the alibi testimony that had been admitted was set forth, also with reference to its weaknesses and, in particular, the fact that the prosecutor had characterized that testimony in summation as "too early and too late". Finally, Bernardo Rodriguez's testimony at the State court

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[19] Pet. Appx at 43a-106a.

hearing, as well as the federal hearing testimony, was then set forth. Pet. Appx at 44a-69a.

Turning to the alibi preclusion issue, the crux of the Magistrate's holding was that:

> [N]o evidence was presented either at trial or at the hearing held in this Court from which it could be inferred that Mr. Rawlins' failure to give notice to the prosecution of Bernardo Rodriguez was willful or motivated by a desire to gain a tactical advantage.... The record amply supports the conclusion that Mr. Rawlins' failure to come forward earlier with Mr. Rodriguez as an alibi witness was due to a combination of his last minute trial preparation, forgetfulness, and ineptitude... The state [trial] court never made any finding of willfulness nor inquired into whether defense counsel's 'failure to comply with the notice requirement was designed to frustrate the truth-seeking function of the trial'.... Again, on appeal, the state court did not probe this issue and merely found that the trial court properly exercised its discretion in precluding Mr. Rodriguez from testifying... Here, ...the trial court could have minimized any prejudice to the prosecution with a short adjournment, and therefore some finding of willfulness was necessary....Where the state court has not made any finding as to wilfulness, as is the case here, the petitioner is denied his right to present a defense. Pet. Appx at 88a-91a.

Based on the foregoing, the Magistrate found that "By not considering 'whether defense counsel had willfully or in bad faith failed to comply with the alibi notice requirement', ...the [State courts] did not follow Supreme Court precedent as established in *Taylor* [*v. Illinois*, 484 U.S. 400 (1988)]" and, under *Williams v. Taylor*, 529 U.S. 362 (2000), their decisions excluding Bernardo Rodriguez's alibi testimony were "contrary to" settled Supreme Court case law. Pet. Appx at 95a.

The Magistrate also found this error was not harmless. In particular, the inconsistencies in the testimony of the two alibi witnesses who had testified were noted, as was the prosecutor's summation in which it was argued that "the testimony from the two alibi witnesses was not inconsistent with the prosecution's theory of the case, because neither could account for the petitioner's whereabouts from a little after 10:00 to 10:45 p.m., thus giving him enough time to commit the murder", *i.e.*, "what you get is too early and too late" (T. 517-8). By contrast, "Mr. Rodriguez's testimony places the petitioner at home during the period of time *unaccounted for* by

other witnesses, thus providing critical support to Mr. Bohan's alibi and undermining the prosecutor's argument". In addition, the Magistrate explicitly noted that the District Attorney had "conceded that Mr. Rodriguez's testimony, if believed, was *not cumulative*". Pet. Appx at 96a-102a.[20]

Turning to the related issue of defense counsel's failure to file an alibi notice for Rodriguez, the Magistrate found that the first prong of *Strickland v. Washington,* 466 U.S. 668 (1984) had been satisfied because "Mr. Rawlins' failure to provide notice was caused by his sheer ineptitude", "in no sense can that failure be attributed to a strategic choice", and Rawlins' misconduct "'clearly falls outside of the wide range of professionally competent assistance'". Pet. Appx at 102a-103a. Addressing the second, or "prejudice", prong of *Strickland*, the Magistrate ruled that "the preclusion of Mr. Rodriguez deprived the petitioner of a critical witness who would have provided testimony closing the time gap in the alibi" and "it is more than a 'reasonable probability' that the trial result would have been different 'but for' the errors of Mr. Rawlins, thus depriving the petitioner of a fair trial". Pet. Appx at 103a.

The state appeals' court decision that Rawlins' incompetence "could not have deprived [respondent] of a fair trial" was "an unreasonable application" of *Strickland* because it was "objectively unreasonable" to find that Rawlins' misconduct had no effect on the outcome of the trial, *i.e.*, "There was no reasonable justification for [the state court's] conclusion that the preclusion of Mr. Rodriguez did not result in the deprivation of a fair trial for the petitioner". Pet. Appx at 104a-105a.

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[20] Regarding any claim that Rodriguez's testimony was not believable, the Magistrate summarized that testimony, held that "Mr. Rodriguez is not an inherently incredible witness", and then ruled that other matters, such as his relationship with respondent and/or any inconsistencies were "matter[s] of credibility, not reliability", and presented "a question for the jury, not this Court". Pet. Appx at 100a-102a.

Accordingly, the Magistrate recommended that the writ be granted. Pet. Appx at 105a-106a.

The District Judge's Decision[21]

The District Judge issued a 47-page decision "fully adopt[ing] the Report and Recommendation" and granting the writ.

As had the Magistrate, the District Judge (a) first analyzed the trial evidence in great detail, with particular reference to the numerous inconsistencies and contradictions in the testimony of the prosecution witnesses on crucial points of evidence, (b) set forth the alibi testimony, also referring to it's weaknesses, and (c) set forth, the State court hearing testimony, and the federal evidentiary hearing testimony. Pet. Appx at 6a-18a.

After summarizing the Magistrate's ruling on the alibi preclusion issue, the District Judge turned to the District Attorney's objections thereto.

First of all, the District Attorney argued that the State court decisions were not "contrary to" *Taylor, supra*, on the ground that case had not mandated a finding of "willfulness" as a pre-requisite to preclusion of unnoticed alibi testimony. However, citing to and quoting from *Taylor*, the District Judge held that *Taylor had* mandated that willfulness *was* required for such preclusion.[22] Pet. Appx at 28a-32a.

Next, the District Judge rejected the argument that the state courts had made the required finding of willfulness. The District Judge found that while the trial court had ruled that Rawlins had not shown "good cause" for failing to file the alibi notice, "the absence of a good excuse is not

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[21] Pet. Appx at 5a-42a.

[22] Although the "level" of the willfulness required might vary depending on the availability of "less onerous sanctions" and/or with the degree of prejudice to the prosecution. *Ibid.*

necessarily commensurate with willful conduct".[23] Finally, it was noted that the Appellate Division was completely silent on this issue. Pet. Appx at 32a-33a.

The District Judge next rejected petitioner's argument that willfulness need not have been shown because the Magistrate erred when he held that any "prejudice" from allowing Rodriguez to testify could have been minimized by a short adjournment to investigate that witness.[24] In response, the District Judge first noted that such an adjournment need not "eliminate", but only "minimize", any such prejudice. Next, it was observed that if, as petitioner contended, Rodriguez's testimony was a "sham", that fact would have been easy to show, *e.g.*, through the testimony of other occupants of the apartment who had not mentioned Rodriguez in their statements to the police: in that regard, the Judge noted that one of those persons (Roberto Cruz) had testified at the trial, and another (Alberto Montilla) had been in the courtroom throughout the trial. Pet. Appx at 32a-33a.[25]

Turning to the issue of harmless error, the argument that Rodriguez's testimony would have been cumulative was rejected on two grounds: such testimony would have bolstered the testimony of the other alibi witnesses, and it would have negated the trial prosecutor's summation regarding the alleged "time gap" in Feci and Cruz's testimony. As the Judge expressly noted, "Ironically, although

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[23] Noting that the Magistrate had credited Rawlins' testimony that he had not failed to give alibi notice out of willfulness or to gain an advantage over the prosecution, the District Judge agreed that "the record convincingly supports the finding that Rawlins simply mishandled the matter..." Pet. Appx at 31a.

[24] As the District Judge had noted previously (Pet. Appx at 9a, n.3), an adjournment of up to three days would have been required under C.P.L. §250.20 (3), had the prosecutor requested it.

[25] It must also be noted that (a) neither during the 7 days between learning of Rodriguez's identity and the State evidentiary hearing, (b) nor during the 3 months between oral argument before the Magistrate and the Federal evidentiary hearing, did respondent unearth a single shred of evidence that would impeach Rodriguez.

the prosecution adamantly maintained at trial it would be prejudiced by the presentation of ... Rodriguez's testimony, it now asserts that the same testimony would have been cumulative and inherently incredible". Pet. Appx at 35a-38a.

Furthermore, the argument that Rodriguez was lying was dismissed as "of no consequence" because "the degree to which ... Rodriguez's credibility was affected by his interests and by inconsistent statements of other witnesses is a matter for the jury, not the Court". Pet Appx at 37a

Turning to the incompetence of counsel issue, it was first noted that petitioner had not objected to the Magistrate's findings that (a) Rawlins' failure to serve any alibi notice "was caused by his sheer ineptitude" and (b) that his misconduct "clearly falls outside the wide range of professionally competent assistance", *i.e.,* it was conceded that the first prong of *Strickland,* had been satisfied. Pet. Appx at 40a, n.14.

With regard to the second *Strickland* prong, petitioner argued that respondent was not prejudiced on the ground that Rodriguez's testimony was "unreliable and ... would not have affected the outcome of the trial". However, the District Judge held that (a) Rodriguez's testimony was *not* incredible as a matter of law, (b) "If the jury, or *any single juror*, were to credit ... Rodriguez's testimony *even partially*, ... so that it created a reasonable doubt about Bohan's guilt, he would have been acquitted or entitled to a new trial", and (c) there was "more than a 'reasonable probability' that the trial result would have been different 'but for' Rawlins deficient performance ...". Pet. Appx at 35a-38a, 41a-42a.

Based on the foregoing, the District Judge ruled that the Appellate Division finding that Rawlins' incompetence did not deprive respondent of a fair trial was "an unreasonable application of" *Strickland.* Pet. Appx at 41a-42a.

Accordingly, the writ was granted. Pet. Appx at 42a.

The Court of Appeals' Decision

In a summary, and unpublished, order, the Second Circuit affirmed "for substantially the reasons stated by the district court". The court did assert that "we have doubts as to whether *Taylor v. Illinois* prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of wilfulness". Pet. Appx at 2a-3a.

After rehearing was denied (Pet. Appx at 4a), petitioner sought *certiorari*.

REASONS FOR DENYING THE WRIT

1. Petitioner asserted that *Taylor v. Illinois*, 484 U.S. 400 (1988) did not require willfulness as a prerequisite to the preclusion of evidence for violation of a discovery rule. Further, petitioner purported to find support for that assertion in an alleged "split" in the Circuits on that issue. Finally, petitioner asserted that *certiorari* should be granted both to resolve the alleged split and to interpret *Taylor* in a way that does not "eviscerate" discovery provisions.

Contrary to the foregoing, (a) *Taylor* did require willfulness as a prerequisite to the preclusion of evidence for violation of a discovery rule, (b) the "split" asserted by petitioner is more apparent than real, and (c) in any event, *certiorari* should not be granted because, for reasons which will be set forth in full below, any decision on the *Taylor* issue would constitute an "advisory opinion".

(a) A fair reading of *Taylor* establishes that this Court held that a finding of willfulness was a prerequisite to the proper imposition of the preclusion sanction.

The operative facts in *Taylor* are easily stated: the State judge found that defense counsel's violation of a discovery rule regarding naming anticipated witnesses was "willful", and she precluded the defense from calling an un-noticed witness. 484 U.S. at 405.

Upholding that decision, this Court first noted that "We find that such a sanction [preclusion] is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment, and find no constitutional error on the *specific facts* of this case", *i.e.,* where *willfulness* was present. *Id.* at 402.

The Court then noted that "there are instances in which they [*i.e.,* sanctions other than preclusion] would perpetuate, rather than limit, the prejudice to the State and the harm to the adversary process". *Id.* at 413. That remark can only have been addressed to *willful* violations, because *unintentional* violations would not be deterred by the preclusion sanction. That is made clear by the immediately following sentences, *i.e.,* "Defendants who are *willing to fabricate* a defense may also be *willing to fabricate* excuses for failing to comply with a discovery requirement", *ibid.*, and "If a pattern of discovery violations is explicable only on the assumption that the violations were *designed to conceal a plan to present fabricated testimony*, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited". *Id.* at 414.

Based on the foregoing, the Court's *holding* was:

> If ... [a discovery violation] was willful and motivated by a desire to obtain a tactical advantage ..., it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.... The trial judge found that the discovery violation in this case was ... willful, ... the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable...., [and] it is plain that the case fits into the category of willful misconduct in which the severest misconduct is appropriate. *Id.* at 415.

Notably, the Court also held that, once willfulness was shown, whether lesser sanctions might have ameliorated any prejudice was irrelevant. *Ibid.* That is further evidence that, although issues such as prejudice and lesser sanctions are *generally* relevant to the determination of the proper sanction, proof of willfulness is an absolute prerequisite to the imposition of the ultimate sanction of

preclusion.[26]

That the foregoing is the holding of *Taylor* is strengthened by the Court's subsequent references to *Taylor*. *See, e.g., Michigan v. Lucas,* 500 U.S. 145, 152 (1991)("We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, ... we stated explicitly ... that there could be circumstances in which preclusion was justified because a less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.' The trial court found that Taylor's discovery violation amounted to 'willful misconduct' and was designed to obtain a tactical advantage.' Based on these findings, we determined that ... 'the severest penalty was appropriate'.").[27]

In sum, the lower courts properly held that *Taylor* required the most culpable misconduct - willfulness- to justify the most "extreme" sanction - preclusion - and that such was not present in this

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[26] Even the dissenting Justices, who would not have permitted preclusion for a willful violation of the discovery rules by defense counsel, would have permitted preclusion for such a willful violation by the defendant. *Id.* at 433, 436. Thus, even the dissenting Justices provide further support for the majority's position that willfulness is a prerequisite to preclusion.

[27] The foregoing also rebuts petitioner's hyperbolic claim that the decision in this case would "eviscerate" discovery rules. Pet. at 13. On the contrary, in the absence of willfulness, it leaves prosecutors free to ask, and courts free to agree, to impose any and all sanctions other than the "most extreme" sanction of preclusion.

Petitioner's related claim - that courts in New York, Connecticut, and Vermont, the three states in the Second Circuit, will "act at their peril" in precluding evidence for discovery violations (Pet. at 13) - is also incorrect. That is so because (with the exception of the court in *this* case), the State courts in those States have uniformly (and properly) interpreted *Taylor* as requiring willfulness to justify preclusion. *See, e.g., People v. Walker,* 294 A.D.2d 218, 219, 743 N.Y.S.2d 403, 404 (1st Dept 2002)(preclusion permitted only where discovery violation was "willful", citing *Taylor*); *State v. Passino,* 161 Vt 522, 525-6, 640 A.2d 547, 550-2 (Vt. 1994)(same); *State v. Carter,* 228 Conn. 412, 426-429, 636 A.2d 821, 829-30 (Conn. 1994)(same).

case.[28]

(b) Petitioner asserted that "the Circuits are split" on the issue of whether preclusion is permissible in the absence of a willful violation of a discovery statute.

First of all, in view of the foregoing, any of the Circuits which held that willfulness was not required to invoke the preclusion sanction were misapplying a clearly stated rule of law. By this Court's own Rules, that is *not* a proper basis for granting *certiorari*. Rule 10 ("Certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").

Secondly, any alleged split in the Circuits is more apparent, than real.

Initially, it must be noted that petitioner conceded that both the Second and Ninth Circuits have consistently held that *Taylor* requires a finding of willfulness. Pet. at 10.

Furthermore, petitioner's argument that other Circuits are to the contrary is based on isolated and partial snippets, many of which are pure *dicta*.

District Of Columbia Circuit. In *United States v. Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992), the court stated "We think that any requirement of bad faith as an absolute precondition to exclusion would be inconsistent with the *Taylor* Court's references to trial court discretion and its extended discussion of the relevant factors".

First of all, this Court's "references to trial court discretion and its extended discussion of the relevant factors" was with regard to its discussion of sanctions in general, not the extreme sanction of preclusion. 484 U.S. at 410-14. As a matter of fact, the Circuit implicitly conceded that fact when it noted that "Authorizing the trial court to demand an explanation for the delay, the Court [in *Taylor*]

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[28] This Court has denied *certiorari* in numerous other cases alleging uncertainty in this portion of the *Taylor* decision. *See, e.g., Tyson v. Trigg,* 50 F.3d 436 (7th Cir. 1995), *cert. den.*, 516 U.S. 1041 (1996), Petition for Writ of *Certiorari*, Dkt No. 94-2050, at Point II.

said that 'if the delay was willful and motivated by a desire to obtain a tactical advantage ...', exclusion would be 'entirely consistent' with the purposes of the compulsory process clause". 970 F.2d at 910. Finally, *Johnson* was cited in *Bowling v. Vose,* 3 F.2d 559, 561 (1st Cir. 1993), *cert. den.* 510 U.S. 1185 (1994) as a case "affirming exclusion ... [because it] involve[d] willful conduct".

First Circuit. In *Chappee v. Vose,* 843 F.2d 25, 29 (1st Cir. 1988), it was stated that *Taylor* "declined to cast a mechanical standard to govern all possible cases". However, all the quoted statement meant was that *Taylor* had set forth a number of factors - such as the amount of prejudice to the prosecution, alternative sanctions for minimizing any such prejudice, etc. - to consider in determining what sanction was permissible for non-compliance with State pre-trial discovery statutes. Of greater pertinence here, that statement did *not* mean that the First Circuit was holding that *Taylor* did not require a finding of willfulness as an absolute pre-condition to such preclusion.

First of all, the First Circuit's opinion is replete with references both to *Taylor*'s insistence on willfulness and that the discovery violation in the case before it was, in fact, willful. 843 F.2d at 27-32. Accordingly, even if the quoted passage bears petitioner's interpretation, it is a mere *dictum.*

Furthermore, the First Circuit explicitly referred to *Taylor* as setting forth a "rule of decision", *i.e.,* that willfulness is a precondition to preclusion. 843 F.2d at 30. As matter of fact, *Chappee* has been cited as holding precisely that, both by the First Circuit itself, and other courts. *See, e.g., Bowling v. Vose, supra,* 3 F.3d at 561 (referring to "circuit court cases affirming exclusion in response to discovery violations involve willful conduct. *See ... Chappee v. Vose...*")[29]; *People v.*

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[29] Judge Torruella, who authored *Bowling*, was on the panel that decided *Chappee.* Furthermore, *certiorari* was *denied* in *Bowling.* Lastly, *Bowling* was cited in *Tyson v. Trigg,* 50 F.3d 436, 445 (7th Cir. 1995), as an example of a court which "believe[d] ... that the exclusion of a witness or witnesses who would be helpful to the defendant is permissible only if the violation of the discovery order was deliberate ... ".

Huang Qike, 182 Misc.2d 737, 747, 700 N.Y.S.2d 640, 648 (S. Ct., K. Co. 1999)(asserting that "federal courts will exclude evidence in response to a discovery violation only if willful conduct is involved ... *Chappee v. Vose* ...").

Fifth Circuit. It is true that in *United States v. Alexander*, 869 F.2d 808, 812 (5th Cir. 1989), it was stated that "The Supreme Court's decision in *Taylor* gives us little guidance in determining whether the preclusion sanction is permissible"; however, that merely acknowledged that *Taylor* did not set forth a "bright line" rule governing every case, *i.e.,* that *Taylor* requires a trial court to examine many factors. Moreover, on the ground that any error in imposing the preclusion sanction was harmless, the Circuit expressly declined to decide if *Taylor* required willfulness. *Ibid.* Therefore, to the extent that the above quoted statement supported petitioner's position, it was pure *dictum.*[30]

In any event, the Fifth Circuit does not seem to have had difficulty in understanding or applying *Taylor* in later cases. *See, e.g., United States v. Mizell,* 88 F.3d 288, 294-5 (5th Cir. 1996)("The Supreme Court has held that a [trial] court can preclude a defendant from calling a witness as punishment for the defendant's willful violation of a discovery order. *See Taylor* [*v. Illinois*, 484 U.S. 400,] 414 [1988] (holding that preclusion of a witness's testimony was appropriate where the defendant's violation of a discovery request was 'willful and motivated by a desire to obtain a tactical advantage')..... There is no indication that Mizell's omission of Turnage's name on her witness list was willful or done out of an attempt to gain an unfair advantage over the prosecution. Indeed, the district court did not find that Mizell willfully violated the discovery rules... As a result, Mizell's rights under the Compulsory Clause of the Sixth Amendment were violated by the court's

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[30] It is worth noting that the *Government*, citing to, and quoting from, *Taylor* read that case as permitting preclusion only "in any case in which the discovery abuse 'was willful and motivated by a desire to obtain a tactical advantage, ...". *Ibid.*

preclusion of Mizell's witness").

Seventh Circuit. In *Tyson v. Trigg, supra*, the court was highly critical of *Taylor* on the asserted ground that, as a result of *Taylor*, discovery rules will become "weak if they can only be enforced against willful violators". 50 F.3d at 445. Based thereon, the court stated that "Our court has yet to take a position on the question [whether preclusion is permissible only if the violation of the discovery order was willful] ... and *Taylor* itself appears to leave the question open". *Ibid.*[31]

Of course, the first assertion simply misstated *Taylor* because that case did not say that *no* sanction could be enforced unless the violation was willful: rather, it said only that the *ultimate* sanction of *preclusion* could not be imposed unless the violation was willful. 484 U.S. at 415. And, for the same reason, the second assertion - that *Taylor* left open the question of whether preclusion required willfulness - was simply wrong. *Ibid.*[32]

Finally, the court declined to decide that issue because it found any violation harmless error. *Id.* at 446-7. Accordingly, the court's claim that *Taylor* left open the issue of whether preclusion required willfulness was pure *dictum.*

Tenth Circuit. *Watley v. Williams*, 218 F.3d 1156 (10th Cir. 2000) involved the preclusion of evidence where defense counsel's discovery violation had not been willful. The court held that "Reasonable minds may disagree about the appropriateness of excluding an alibi witness whom Petitioner's counsel did not willfully omit, but under AEDPA we are limited to applying existing Supreme Court precedent", *i.e.*, *Taylor* had not held that willfulness was always required for

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[31] Notably, the Circuit did not cite to any portion of *Taylor* to support its assertion.

[32] It should also be noted that Judge Flaum, in concurrence, held that *Taylor* had expressly held that willfulness was a prerequisite to preclusion": however, he also agreed that the erroneous preclusion of evidence was harmless. *Id.* at 450.

preclusion. *Id.* at 1159.

Based on the foregoing, although decisions from the allegedly "split" Circuits contain statements appearing to call the holding of *Taylor* that preclusion requires willfulness into question, some of those statements simply did not do that, some of the statements were *dicta*, others have been "overruled" by later decisions agreeing that *Taylor* held that preclusion requires willfulness, and others were simply wrong. In other words, any "split" in the Circuits is more apparent than real. And that conclusion is reinforced by the fact that *certiorari* was denied in several of those case desp[ite a claim of a split in the Circuits. *See, e.g., Noble v. Kelly,* 246 F.3d 93 (2d Cir.), *cert. den.* 534 U.S. 886 (2001), Petition for Writ of Certiorari, Dkt. No. 01-28, at Point I .

c) It is "hornbook law" that this Court will not issue an "advisory opinion". It is submitted that any decision in this case would constitute such an opinion, for two separate reasons.

i) The lower courts granted the writ in this case on two grounds: first, that the exclusion of alibi evidence violated *Taylor*; and, second, that defense counsel was incompetent for not filing any alibi notice. The incompetence of counsel ground is *wholly independent* of the *Taylor* ground and, even if *certiorari* was granted on the *Taylor* ground and that ground was decided against respondent, respondent would still be entitled to the same relief he has already received, *i.e.,* the writ would still be granted. Accordingly, any decision on the *Taylor* ground would constitute a purely "advisory opinion", which this Court has repeatedly held it will not render. *See, in general, Herb v. Pitcairn,* 324 U.S. 117, 125-6 (1945)("Our only power over State judgments is to correct them ..., not to revise opinions. We are not permitted to render an advisory opinion, and *if the same judgment would be rendered by the ... court after we corrected its view of ... [a portion of the] law, our review would amount to nothing more than an advisory opinion*"). *Cf. Fay v. Noia,* 372 U.S. 391, 430-1 (1963),

overruled on other grounds, Coleman v. Thompson, 501 U.S. 722 (1991)(Supreme Court will not address merits of *habeas corpus* issue, where "independent and adequate state ground" for denial of writ exists: citing to, and quoting from, *Herb v. Pitcairn, supra*).

Since, as will be demonstrated, *infra*, there is no basis for granting *certiorari* to examine the second ground on which the writ was granted, *certiorari* should also be denied on the first ground. *See, also, Stern and Gressman,* Supreme Court Practice, 455 (*certiorari* usually denied where "the decision below is correct without regard to the question sought to be raised by the petition, and ... as a result, the Supreme Court would not likely reach the point of alleged importance or conflict").

ii) Assuming, *arguendo,* that, despite the foregoing, this Court granted *certiorari* to decide the *Taylor* issue, and then decided that *Taylor* did *not* require willfulness in order to preclude unnoticed evidence, there would have to be a remand for the lower courts to decide whether preclusion was permissible on all of the *Taylor* factors. However, the lower courts have already ruled that none of the other factors - such as prejudice to the prosecution - existed to any appreciable degree, and that lesser sanctions - such as the mandatory three-day adjournment - would have remedied any prejudice that did exist. Pet. Appx at 31a-32a, 92a and n. 27. Therefore, any decision by this Court on the merits would also constitute an impermissible "advisory opinion". *Herb v. Pitcairn, supra.*

In sum, *Taylor* clearly established that preclusion is only permitted where there was a willful violation of a discovery rule, there is no "split in the Circuits" on that issue, and granting *certiorari* (and/or deciding this case) would constitute an "advisory opinion". Accordingly, *certiorari* should be denied.

2. Petitioner's second ground for *certiorari* - that "the courts below wrongly applied Second

Circuit law when there was no clearly established law from this Court" (Pet. at 15) - requires little discussion.

In the first place, and as established above (*see* 1 (a)), there was , and is, clearly established law from this Court, *i.e., Taylor v. Illinois* and *Michigan v. Lucas, supra.*

Secondly, the lower courts' reference to *Noble v. Kelly,* 89 F.Supp.2d 443 (S.D.N.Y. 1999), *aff'd* 246 F.3d 93 (2d Cir.), *cert. den.,* 534 U.S. 886 (2001), was perfectly proper because that case relied on *Taylor, supra. See* , 89 F.Supp.2d at 454-61, 246 F.3d at 99-102 (discussing, and applying *Taylor*).

Finally, and to paraphrase the District Court (*see* Pet. at 30a-31a, n. 10), "*Williams* [*v. Taylor*, 529 U.S. 362 (2000)], does not indicate that a district or circuit court is required, or even permitted, to disregard the Circuit's interpretation of 'clearly established Federal law, as determined by the Supreme Court ...". Such a reading of *Williams* is inconsistent with the history and structure of our federal courts".[33]

Accordingly, *certiorari* should be denied.

3. Petitioner's third ground for *certiorari* - that the lower courts' analysis of the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984) "conflicts with this Court's *habeas* jurisprudence (Pet. at 17) - also merits only short shrift.

The State court held that defense counsel's incompetence was not prejudicial error (Pet. Appx at 108a). Petitioner asserted that the lower Federal courts merely "substituted [their] own independent judgment" for that of the State court, rather than finding that court's holding "objectively

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[33] Again, and as with petitioner's first ground, granting *certiorari* (and/or deciding this case) on the second ground would also constitute an "advisory opinion".

unreasonable" (Pet. at 17-18).

A plain reading of the lower court decisions makes it clear that, rather than substituting their judgment for that of the State court, the courts found that holding "objectively unreasonable". As the Magistrate Judge held:

> With regard to the second prong of the *Strickland* analysis, the petitioner has also met his burden.... [T]he preclusion of Mr. Rodriguez deprived the petitioner of a critical witness who would have provided testimony closing any time gap in the alibi.[34] Finally, it is more than a 'reasonable probability' that the trial result would have been different 'but for' the errors of Mr. Rawlins, thus depriving the petitioner of a fair trial....
> The state court in this case found that the 'defendant received meaningful representation. Counsel's alleged error could not have deprived defendant of a fair trial.... The state court's application of clearly established federal law in denying the petitioner's effective assistance claim of appeal was *objectively unreasonable*". *See Williams*, 529 U.S. at 409 ('[A] federal *habeas* court making the "unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively unreasonable*'). There was no reasonable justification for its conclusion that the preclusion of Mr. Rodriguez did not result in the deprivation of a fair trial for the petitioner. *See id.* at 411 ('[A] federal *habeas* court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable'). Accordingly, trial counsel's performance was constitutionally ineffective, and that provides a second ground for issuance of a writ of *habeas corpus*. 103a-105a (emphasis added).[35]

As a matter of fact, the portions of *Williams v. Taylor, supra,* cited to, and quoted from in the above passage were the very portions of that case that petitioner asserted the lower courts ignored. *Compare* Pet. Appx at 105a *with* Pet. at 17.

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[34] That refers to the trial prosecutor's summation, in which he argued that the testimony of one of respondent's other alibi witnesses was "too early" and the testimony of the other alibi witness was "too late", *i.e.*, there was a "time gap" during which respondent could still have committed the crime. Pet. Appx at 99a-100a.

[35] The District Judge "agree[d] with the Report's conclusion that the Appellate Division's denial of Bohan's ineffective assistance of counsel claim was 'an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court'". Pet Appx at 41a-42a.

In sum, there is no basis for granting *certiorari* on this ground.[36]

CONCLUSION

For the above reasons, respondent Robert Bohan respectfully requests this Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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[36] In view of the demonstrated lack of "certworthiness" in this ground, it is respectfully suggested that petitioner, aware of the rule against advisory opinions (*see* 1 (c), *supra*), merely "tacked on" this ground in an attempt to bolster her arguments for *certiorari* regarding *Taylor*.